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Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform

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CRIMINAL LAW

RETROACTIVE LEGALITY: MARIJUANA CONVICTIONS AND RESTORATIVE JUSTICE IN AN ERA OF CRIMINAL JUSTICE REFORM

DEBORAH M. AHRENS*

The last decade has seen the beginning of a new era in United States criminal justice policy, one characterized by a waning commitment to over-criminalization, mass incarceration, and a punitive War on Drugs as well as a growing regret for the consequences of our prior policies. One of the central questions raised by this shifting paradigm is what to do about the millions of individuals punished, marked, and shunned as a result of policies we now regret. This issue is particularly pointed for marijuana convictions, as the coexistence of strict regimes of collateral consequences for drug convictions and the active government promotion of a new cannabis economy present a stark and deeply racialized contrast. This Article argues that, in states where marijuana has been legalized, our policy-making apparatus should acknowledge and move to redress both the failings of our prior system of drug regulation and the social and economic disparities in current law by embracing a concept of “retroactive legality.” Retroactive legality is a framework in which we seek to restore those convicted of marijuana crimes to the rights and civic status they would have had if their conduct had never been illegal. Such an approach would build upon the piecemeal expungement and pardon policies adopted or proposed in some of these jurisdictions but would reach substantially further, by incorporating those convicted of more serious offenses, putting the onus on the state to identify

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and clear such convictions, and declining to impose additional requirements and costs on those seeking to have their convictions retroactively legalized.

INTRODUCTION	380
I. MARIJUANA REGULATIONS: THEN AND NOW	388
A. A Brief History of Marijuana (and Narcotics) Laws in the United States	388
B. A Racially Disparate Regime	391
C. The Movement towards Marijuana Legalization.....	393
II. RATIONALES FOR AND CONSEQUENCES OF LEGALIZATION	397
III. THE CASE FOR CLEARING MARIJUANA CONVICTIONS.....	404
A. A Climate of Reform	404
B. Current Efforts to Erase or Limit Marijuana Convictions	406
C. Prior Episodes of Decriminalization and Legalization ...	411
D. Marijuana Prosecutions and Systematic Injustice	413
E. Collateral Consequences of Criminal Convictions.....	415
F. The Scope of Eligibility.....	420
IV. THE MECHANICS OF RETROACTIVE LEGALITY.....	425
A. Mass Pardons.....	425
B. Expungements (and Record Sealing).....	431
V. RESPONDING TO POSSIBLE CONCERNS	434
CONCLUSION.....	439

INTRODUCTION

On January 4, 2019, Washington Governor Jay Inslee, while attending the 2019 Washington Cannabis Summit,¹ announced that he planned to offer

¹ WASH. ST. CANNABIS SUMMIT, <http://www.wacannabissummit.org/> [<https://perma.cc/A5V-BCHJ>]. The existence of such a (sold-out) summit is itself worth noting as a reflection of the increasing interest in and economic power of the legal cannabis industry. The summit featured panels on both the industry itself and political/policy objectives and advertised participation from the Governor as well as the director of the state's Liquor and Cannabis Board and a policy advisor to the state Department of Agriculture. *Id.* There are similar annual conventions in other states that have legalized marijuana, with similar agendas and features. The National Cannabis Industry Association Summit, for example, was held in the spring of 2019 and included sessions on "Cannabis Business 101" and Continuing Legal Education courses for attending lawyers. Press Release, Nat'l Cannabis Indus. Ass'n, Cannabis Business Summit & Expo 2019 Anticipated to Attract 10,000+ Attendees, 150+ High-Profile Speakers (May 17, 2019), www.globenewswire.com/news-release/2019/05/17/1826929/0/en/Cannabis

a pardon process to about 3,500 people convicted of single minor marijuana possession charges.² The juxtaposition between present and past attitudes toward marijuana regulation was striking. The summit featured as panelists academics, industry leaders, and government officials—people prominent and successful in their respective, respected communities—gathered to consider how “[t]o inspire leaders in this industry to envision a world in which a robust cannabis industry can thoughtfully help the environment, the economy, and social issues.”³ Just seven years ago, a person attempting to engage in any such industry would have been subject to criminal conviction and substantial terms of imprisonment under Washington State law.⁴ Trying to draw connections between that past and our very different present, Governor Inslee addressed one of the most pressing issues raised by the legalization movement, which is the generations of individuals from the pre-legalization era that remain to some extent permanently locked out of the kind of prominence and success enjoyed by people currently engaged in cannabis commerce.⁵ While Governor Inslee’s attempt to draw attention to this issue and to begin to craft a solution is a strong first step, this Article argues that it and other similar efforts launched in other jurisdictions are both practically and conceptually insufficient to redress the lingering consequences of an excessively punitive and racially discriminatory regime that we have begun to repudiate.

Twenty years ago, the War on Drugs was in full swing;⁶ it was not until the late 1990s and early 2000s that governments began engaging in policy shifts toward substance use that suggested that the war was not an eternal

-Business-Summit-Expo-2019-Anticipated-to-Attract-10-000-Attendees-150-High-Profile-Speakers.html [https://perma.cc/E5UN-CB59]; *NCBA Presents Continuing Legal Education for Lawyers*, INT’L CANNABIS BAR ASS’N, <https://www.canbar.org/ncbaatncia> [https://perma.cc/J3NR-WAHJ].

² Gene Johnson, *Washington Gov. Inslee to Pardon Marijuana Convictions*, AP NEWS, Jan. 4, 2019, <https://apnews.com/a57f9cd5ec4a40bcbdf7467589da617d> [https://perma.cc/VX X4-KR74].

³ WASH. ST. CANNABIS SUMMIT, *supra* note 1.

⁴ Washington State broadly legalized medical marijuana in 1998 and legalized recreational marijuana in 2012, both times by voter initiative. *See infra* notes 81–87 (citing and discussing these initiatives and related developments).

⁵ *See* Johnson, *supra* note 2.

⁶ The “War on Drugs” is, of course, the partially descriptive, partially metaphorical name given to the United States’ concerted, punitive effort to crack down on the use of illegal drugs between roughly 1971 and 2009. This “War” in turn drew on themes and strategies with deep roots in American public policy. For a discussion of the War as it relates to marijuana, see *infra* Part I. For this author’s take on the War more generally and on the broader history of American drug policy, see Deborah Ahrens, *Methademic: Drug Policy in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 846–59 (2010).

one.⁷ The fact that the governor of a state who was positioning himself for a possible 2020 presidential run⁸ would announce that he planned to use his executive pardon power to erase the lingering effects of drug convictions was the latest remarkable event in the 2010s, and highlights the reimagining of the criminalization of drugs that has marked the decade.

The common wisdom for decades has been that criminal law is a “one-way ratchet,” turning only in the direction of criminalizing more conduct and punishing existing offenses more harshly.⁹ This narrative has been problematized by a mild trend towards decarceration in the past decade, pushed in part by a substantive desire for criminal justice reform and in part by the reality of overburdened state budgets and declining faith in the ability of criminal justice to combat social problems, particularly substance use.¹⁰

⁷ In 2009, the Obama Administration declared an end to the War on Drugs that President Nixon had announced in the 1970s, signaling that the administration planned to reorient towards treatment and away from incarceration. Gary Fields, *White House Czar Calls for End to ‘War on Drugs,’* WALL ST. J., May 14, 2009, <https://www.wsj.com/articles/SB124225891527617397> [<https://perma.cc/RLZ8-HQBR>]. The Trump Administration has sent more conflicting signals. On the one hand, Attorney General Jeff Sessions, during his tenure, seemed intent on reinvigorating the use of criminal prosecution to combat a perceived drug scourge. See, e.g., Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs,* WASH. POST, Apr. 8, 2017, https://www.washingtonpost.com/world/national-security/how-jeff-sessions-/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.2b8484a1e259 [<https://perma.cc/42UY-5JQC>]. To the extent that the Administration has tried to roll back legalization efforts, it has encountered a bipartisan Congressional barrier, as legislators have highlighted the disconnect between a Republican states’ rights platform and efforts to crack down on legal marijuana use and pointed out that candidate Donald Trump had campaigned on a platform that left marijuana laws to states. See Matt Laslo, *Pot Showdown: How Congress Is Uniting to Stop Jeff Sessions’ War on Drugs,* ROLLING STONE, Jan. 19, 2018, <https://www.rollingstone.com/politics/politics-features/pot-showdown-how-congress-is-uniting-to-stop-jeff-sessions-war-on-drugs-203859/> [<https://perma.cc/37XN-ZX49>]. As detailed *infra* note 128, the Administration recently signed the First Step Act, which rolls back some drug war excesses.

⁸ See, e.g., Jim Brunner, *Jay Inslee for President? Governor’s Profile is on the Rise,* SEATTLE TIMES, Feb. 21, 2017, <https://www.seattletimes.com/seattle-news/politics/inslees-profile-lifted-with-states-legal-victories-on-immigration/> [<https://perma.cc/3DL7-UMJQ>] (early article explaining presidential ambitions of Governor Inslee and making case for its plausibility).

⁹ See, e.g., Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

¹⁰ The Bureau of Justice Statistics reports that as of the end of 2016, the total corrections population (persons incarcerated in prisons and jails) had dropped for the eighth year in a row; from 2007 to 2016, the proportion of incarcerated Americans dropped from 3,210 to 2,640 in 100,000 adults. DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2016 1 (2018), <https://www.bjs.gov/content>

The traditional narrative was further undermined by the trend toward decriminalizing and/or legalizing the use of marijuana for medical and recreational purposes. Marijuana, once characterized at best as a gateway drug to harder substances,¹¹ and at worst a drug that transformed users into violent criminals,¹² is in several states now legalized and available in suburban strip malls and hipster downtown pot shops, complete with twee signage and tasting bars.¹³ Some additional jurisdictions that continue to formally criminalize marijuana possession have effectively decriminalized its use through no-prosecution policies.¹⁴ Marijuana has gone mainstream, viewed in many states as a reasonable recreational option and an engine of potential economic growth.¹⁵

This social and legal transformation has, however, left people behind. Even as the pace of legalization quickens, people remain incarcerated for marijuana offenses within jurisdictions that have legalized recreational marijuana.¹⁶ Other people are still on probation or parole for marijuana

ent/pub/pdf/cpus16.pdf [https://perma.cc/P9QA-XVXR]. While the number of incarcerated Americans peaked at 2,310,300 in 2008, by the end of 2016, the Bureau of Justice Statistics estimates that 2,162,400 people were incarcerated. *See id.* at 1–2. This decline did not reflect that people who formerly might have been incarcerated were all simply shunted to various forms of correction supervision, such as parole and probation (although even such a shift would be notable); the population of persons under correctional supervision also declined during this period, from a high of 5,119,000 in 2007 to 4,650,900 in 2016 (the number of persons on parole did increase, suggesting that at least some of the decline in incarceration may attributable to increased use of parole; jurisdictions may simply be placing fewer newly-convicted persons under various forms of correctional control). *Id.*

¹¹ *See, e.g.,* McKenzie M. Higgins, *Total Inclusion: Opening Therapeutic Justice Courts to Medical Marijuana Patients in Michigan*, 17 W. MICH. U. COOLEY J. PRAC. & CLINICAL L. 125, 142 (2016) (describing as typical the characterization of marijuana as a gateway drug); Robert L. DuPont, *Marijuana Has Proven to Be a Gateway Drug*, N.Y. TIMES, Apr. 26, 2016, <https://www.nytimes.com/roomfordebate/2016/04/26/is-marijuana-a-gateway-drug/marijuana-has-proven-to-be-a-gateway-drug> [https://perma.cc/Z8TQ-Z3XH] (President of the Institute for Behavior and Health arguing that marijuana is a gateway drug for cocaine, methamphetamine, and heroin).

¹² *See infra* note 45 (discussing early efforts to demonize marijuana users).

¹³ Barney's now cultivates "The High End," a luxury marijuana accoutrement department. Amanda Mull, *Legal Weed Gets a Luxury Makeover*, THE ATLANTIC, Feb. 14, 2019, <https://www.theatlantic.com/health/archive/2019/02/barneys-launches-new-cannabis-department/582772/> [https://perma.cc/KX3S-CMFR].

¹⁴ *See infra* notes 70–76.

¹⁵ For a discussion of some of the ways in which marijuana has been integrated into the commercial and communal life of the jurisdictions who have legalized its use and sale, including some genuinely amusing examples, *see infra* notes 110–117 and accompanying text.

¹⁶ *See infra* notes 53–56 (discussing prosecution and incarceration of marijuana users, sellers, and growers during the War on Drugs).

offenses that preceded legalization.¹⁷ Many more people have criminal records that reflect marijuana offenses, and those criminal histories impede the ability of convicted persons to enjoy full participation in civic life.¹⁸

The extent to which criminal convictions constrain people's lives has been documented thoroughly.¹⁹ The direct consequences of criminal convictions—generally, fines, incarceration, and community supervision—are included in the governing criminal statutes.²⁰ Additional civil laws impose formal legal consequences for criminal convictions, including voter disenfranchisement, disqualification from jury service, and exclusion from some public benefits.²¹ Less formally, persons convicted of crimes also face consequences in employment, private housing, professional licensing, and social interactions.²² These consequences have existed to varying degrees for some time, but they have intensified in an era where information is readily available on the internet and employment, housing, and other life requirements require identification processes that often include background checks.²³ A criminal conviction marks a person fundamentally and indelibly.²⁴

Such a mark is unfair when the essence of the underlying conduct is now viewed as acceptable. Marijuana sales and purchases in several states enjoy governing laws that affirmatively support such activity; legislatures generally crafted these laws in response to public referenda or propositions that supported legalization and reflected that citizens believed the behavior should no longer be prosecuted.²⁵ There is a disconnect between the

¹⁷ See *id.*

¹⁸ See *infra* notes 53–56.

¹⁹ See *infra* notes 180–198 (discussing the collateral consequences of criminal convictions). For one among many outstanding scholarly discussions of these issues, see Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010).

²⁰ Virtually every criminal statute includes a description of direct punishments available. See, e.g., WASH. REV. CODE ANN. § 69.50.101 et seq. (West 2019) (providing up to five years of incarceration and/or a \$10,000 fine for possession of cocaine and offering that a person may qualify for probation in lieu of incarceration).

²¹ See, e.g., Pinard, *supra* note 19; see also *infra* Part III.C (documenting and discussing collateral consequences imposed on those convicted of crimes).

²² See *infra* notes 190–199 and sources cited therein.

²³ For this author's take on that history, see Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 742–50 (2000).

²⁴ See *id.* at 738–40 (drawing on literature to explain how marking and branding of offenders as “other” is a core objective of most formal and informal collateral consequence regimes).

²⁵ See *infra* notes 85–89.

formalization of and favor for the legal cannabis industry and the ongoing consequences faced by persons previously convicted. That disconnect is particularly troubling when the communities harmed by the past excesses of the War on Drugs are not the same communities enjoying the benefit of legalization.²⁶ The continuing constraints lack justification and fail to honor many of the reasons why the legalization movement has succeeded. As this Article explains, the movement to legalize marijuana is grounded not only in forward-thinking interest in raising revenue and reducing government spending but also in retrospective regret over the racial disparities that resulted from and perhaps fueled the War on Drugs, as well as the broader cultural violence wrought by mass incarceration.²⁷

This Article argues that the particular confluence of these factors—particularly the disparities in demographics and fortunes between people prosecuted in the past under criminal law and people currently cashing in on legal cannabis—suggests a paradigm shift in how we should deal with existing marijuana convictions, one grounded in the principle of retroactive legalization. On a conceptual level, our goal ought to be to restore to full civic equality (and full entrepreneurial opportunity) all those prosecuted in the past for activity that would be legal in the present. In addition, we ought to do so through mechanisms that put the onus for implementation on the state, as the collective representative of the forces that imposed an unjustifiable and imbalanced coercive regime, rather than on the individual already operating under the weight of these cumulative sanctions and disadvantages.

Under this paradigm, all marijuana convictions in jurisdictions that have legalized marijuana should be effectively expunged and sealed. Some jurisdictions have already started doing this to a limited extent for misdemeanor marijuana convictions—prosecutors voluntarily are clearing records and expunging convictions where the convictions are minor and where convicted persons meet other eligibility criteria.²⁸ Jurisdictions vary in whether they require the person convicted of an offense to come forward or whether they are willing to do the work to identify and expunge convictions, regardless of whether or not the person convicted is aware that

²⁶ See Shane Croucher, *Alexandria Ocasio-Cortez: Marijuana Prohibition Hit Black and Latino People Hardest So They Should Profit from Legalization First*, NEWSWEEK, Feb. 14, 2019, <https://www.newsweek.com/aoc-marijuana-cannabis-profit-war-drugs-1331214> [<https://perma.cc/38UU-Z9BD>] (describing a congressional hearing where one representative made this point forcefully).

²⁷ For a discussion of some of the reasons fueling this policy change, see *infra* notes 134–158 and accompanying text.

²⁸ For a general discussion of these efforts, see *infra* notes 93–105 and accompanying text.

the conviction is eligible for erasure.²⁹ This Article argues, first, that all jurisdictions where marijuana has been legalized should expunge prior misdemeanor convictions and should do so through automatic mechanisms that do not rely on the individuals convicted of these offenses to come forward, make motions, meet additional criteria, or pay fees for the privilege of regaining their civic equality.³⁰

In addition, this Article suggests that universalizing the clearance of misdemeanors is insufficient. True retroactive legalization requires jurisdictions that have fully legalized the marijuana industry to treat felony marijuana convictions—convictions that may be for distribution, possession with intent to distribute, or trafficking—in the same manner.³¹ Mass expungement for felony convictions is likely to be met with more resistance than forgiving misdemeanor possession convictions,³² but according to the analysis presented here, the broad embrace of the cannabis industry as an engine of economic development and the construction of a regime of laws and government institutions supporting that industry requires such a step. In some ways, this proposal does not go nearly far enough—there is a large body of people who would not have been convicted of other offenses or would not have been sentenced as seriously as they were for other offenses

²⁹ For a discussion of the diversity of approaches employed, see *infra* notes 93–105 and accompanying text.

³⁰ Even some of the better designed programs, like Denver’s “Turn Over a New Leaf” Program, impose significant obligations on those carrying convictions, including meetings with prosecutors that impose psychic costs and potentially expose those individuals to additional scrutiny and legal jeopardy. See Bobbi Sheldon, *You Can Apply to Have Marijuana Convictions Expunged Under New Denver Program*, 9NEWS, Jan. 9, 2019, <https://www.9news.com/article/news/local/you-can-apply-to-have-marijuana-convictions-expunged-under-new-denver-program/73-613378e0-0a68-4e64-a2a3-dda0bb04b297> [<https://perma.cc/LJ8Q-9CNH>].

³¹ While the majority of states that have legalized marijuana for recreational use have also enacted legislation to regulate a legal production and distribution industry in-state, two jurisdictions—Vermont and the District of Columbia—have only legalized personal marijuana possession. See *infra* note 107. In states that do not yet permit legal marijuana businesses, there is not the same imperative to ensure that persons convicted of offenses involving marijuana sales and cultivation enjoy the benefit of having those past convictions cleared.

This Article leaves for another day the question whether it is theoretically appropriate and practically possible to extend the principle of retroactive legality to situations in which an individual came under police suspicion for conduct that is now legal (such as smoking marijuana) but was ultimately convicted of an unrelated crime. For an argument that, whatever lines we choose, retroactive legalization will inevitably be both over- and under-inclusive, see *infra* Part V.

³² See *infra* Part V (discussing reasons that might be put forward to oppose some or all expungements).

if they did not have marijuana convictions,³³ and we might productively debate whether some or all of those people are due some relief from the life-long consequences of their convictions. But eliminating both misdemeanor and felony convictions for marijuana offenses is a concrete first step towards a form of restorative justice³⁴ for the War on Drugs.

In the long term, criminal justice reform—the response to decades of mass incarceration that has positioned the United States as the world’s foremost incarcerator—is going to need to involve structural changes in criminal processes as well as substantive changes in criminal law.³⁵ Academics and activists alike have noted the tendency to treat all social problems as criminal justice problems and to address issues like mental health, homelessness, and substance use disorders through convictions and sentencing, rather than through less expensive civil and community processes that leave less of a permanent mark on individuals and better meet their needs.³⁶ As we hopefully head into an era of transformation, it will be important to think through how to address existing generations of people who already have experienced prosecution and punishment for offenses we have concluded ought not to have been approached through a criminal justice lens. While each area of over-criminalization raises unique issues of redress and restorative justice, this Article is hopeful that we can address marijuana

³³ Under the sentencing systems in place under federal law and in every state, criminal histories play a significant role, either formally or informally, in determining sentences. This process is particularly formalized under the Federal Sentencing Guidelines, which calculate a “criminal history score” that is one of the two major determinants of the recommended sentence. For a chart that demonstrates just how regimented the calculation can be, see the training materials, prepared in 1991, that are used by the Arkansas Public Defender Organization. *Calculating Criminal History: An Outline*, UNITED STATES SENTENCING COMMISSION, https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2011/004c_Calc_Criminal_History_Outline.pdf [<https://perma.cc/S6ZN-ZWHA>].

³⁴ “Restorative justice” may be a somewhat awkward title for changes that do not, as restorative justice generally suggests, bring together a victim and defendant for a form of community-based negotiated resolution, but, rather, offer limited redress to persons convicted of criminal offenses once communities determine that the mark of criminal conviction no longer is appropriate. Nevertheless, restorative justice—a model focused more on a healing process that includes a person who has committed an offense, rather than centering on retribution—is philosophically closer to what this Article advocates.

³⁵ For one well-reviewed look at the opportunities presented by the current criminal justice moment, see RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* (2019).

³⁶ See, e.g., JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 3 (2007) (“Americans have built a new civil and political order structured around the problem of violent crime.”); Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1697, 1701 (2012) (explaining how the use of criminal law and policing strategies warps the ways in which our public schools handle issues of “bullying”).

convictions in a broad and reflective way that will provide a template for future reforms.

Part I describes the history of marijuana regulation in this country, focusing first on the system of harsh criminalization that developed during the twentieth century and then on the rapidly escalating movement for legalization that has picked up steam in the early twenty-first century. Part II discusses and analyzes the reasons for and consequences of the contemporary legalization movement. Part III builds a case for a broad policy of retroactive legality, drawing on the various factors laid out above. Part IV addresses the mechanics of retroactive legalization, balancing the pros and cons of mass pardons and broad expungement policies. Finally, Part V addresses and answers some of the objections that might be raised to this Article's bold policy proposal.

I. MARIJUANA REGULATIONS: THEN AND NOW

A. A BRIEF HISTORY OF MARIJUANA (AND NARCOTICS) LAWS IN THE UNITED STATES

Throughout most of this country's history, marijuana cultivation, sale, and use was untouched by criminal law.³⁷ The United States did not begin the process of addressing illicit substance use and sales with law until 1914, and, even then, early substance regulation was largely civil in nature and focused on importation and sales rather than on individual use.³⁸ That early civil history of substance legislation was marked by racism and nativism—the laws enacted tended to reflect the concern dominant cultural groups had about the deleterious effects of immigrants, minorities, and, particularly, immigrant minorities; thus, these laws sought to regulate drugs thought to be connected with those communities.³⁹ Initial efforts at regulation were

³⁷ See, e.g., DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 1–2 (3d ed. 1999) (describing the popularity of recreational and medical opium use during the nineteenth century).

³⁸ Congress adopted the Harrison Narcotics Act (“the Act”) in 1914. The Act created requirements for narcotics producers and distributors to complete registration requirements, pay taxes, and track sales; unregistered persons were only permitted to purchase narcotics by prescription, although there was no criminal penalty for violation of the Act. See *Harrison Narcotics Act*, Pub. L. No. 63-223, 38 Stat. 785 (1914). Even civil enforcement was lax. See MUSTO, *supra* note 37, at 9.

³⁹ For my fuller take on these themes, see Ahrens, *supra* note 6, at 847. For other research that supports this narrative, see generally TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGEMENT* (1970); JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963); MUSTO, *supra* note

spurred in large part by the association of opioid use with immigrants from China.⁴⁰ Opioids supposedly caused the immigrants to become lazy and violent, and in the popular imagination, they lured white women into opium dens to provide them with narcotics and sedate them for other immoral purposes.⁴¹

While narcotics regulation in the very early twentieth century was entirely civil, by the early 1930s the majority of states attached criminal penalties to narcotics, including cocaine in particular.⁴² This move was fueled in large part by narratives about cocaine-using black Americans who would develop superhuman strength and commit sexual assaults against white women.⁴³ Legislation specific to marijuana followed a similar pattern: as marijuana became linked with a disfavored social group, criminal sanctions followed. In the 1920s and 30s, marijuana became heavily associated with immigrants from Mexico;⁴⁴ politicians portrayed these immigrants as enjoying superhuman powers while under the influence of the drug and linked violent criminality and sexual licentiousness with marijuana.⁴⁵ State legislatures began to class marijuana with narcotics and

37. For a representative work skeptical of the thesis that drug policy generally has centered around attacking unpopular groups, see JAMES B. BAKALAR & LESTER GRINSPOON, *DRUG CONTROL IN A FREE SOCIETY* 68–72 (1984) (arguing that while drug policy does reflect things like attitudes towards minorities, drugs also have specific health effects that may prompt restriction).

⁴⁰ See LESTER GRINSPOON & PETER HEDBLUM, *THE SPEED CULTURE: AMPHETAMINE USE AND ABUSE IN AMERICA* 185 (1975) (arguing that public attitudes towards opium shifted from sympathetic association with wounded, morphine-addicted Civil War veterans to unsympathetic association with Chinese laborers); MUSTO, *supra* note 37, at 5.

⁴¹ See GRINSPOON & HEDBLUM, *supra* note 40, at 185 (arguing that public attitudes towards opium shifted from sympathetic association with wounded, morphine-addicted Civil War veterans to unsympathetic association with Chinese laborers); MUSTO, *supra* note 37, at 5.

⁴² See BAKALAR & GRINSPOON, *supra* note 39, at 14–21 (noting that, by 1931, thirty-six states made unauthorized possession of cocaine a crime).

⁴³ See *id.* at 38–39. While black Americans likely used cocaine at a rate lower than white Americans in this historical period, see *id.* at 39, black Americans became associated with cocaine in cultural imagination, see MUSTO, *supra* note 37, at 43–44.

⁴⁴ See RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* (1974). Marijuana criminalization largely dovetailed with the increase in immigration from Mexico from 1915 to 1930. See *id.* at 13. For a general discussion of the association of marijuana use with Mexican immigrants, see H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980* 93–94 (1981).

⁴⁵ See MORGAN, *supra* note 44, at 38. For example, in the Montana legislature, the association of marijuana with “Mexican beet field workers” was at the center of the argument for criminalization. *Id.* at 39–40.

subject it to criminal penalties during this period.⁴⁶ In 1937, the federal government passed the Marihuana Tax Act, which for all practical purposes made marijuana illegal under federal law.⁴⁷ Anti-marijuana laws, interestingly, were not rooted in public outcry or demand. They appear to have been pushed largely by narrow private interests and individual political representatives.⁴⁸

In the 1970s, marijuana became linked with black communities as well as youthful cultural dissenters, leading to a new stream of condemnation and new efforts to crack down on its use.⁴⁹ As part of a political strategy to mobilize “the silent majority” against other segments of society, President Richard Nixon actively sought to tie drug use broadly, and marijuana use specifically, to those communities—neither of which was at the core of Republican support and both of which Nixon characterized as enemies.⁵⁰ The War on Drugs was both a popular metaphor and a mechanism for directly regulating those communities.⁵¹

By the 1980s and early 1990s, illicit substance criminalization had reached a fever pitch. The era did not focus primarily on marijuana—marijuana did not enjoy the publicity or concern, for example, showered on crack cocaine use—but marijuana offenses were almost always included when legislatures increased maximum penalties for drug offenses,⁵²

⁴⁶ See generally BONNIE & WHITEBREAD, *supra* note 44 (detailing this history).

⁴⁷ Marihuana Tax Act of 1937, Pub. L. 75-238, 50 Stat. 551. The Marihuana Tax Act imposed strict rules requiring an expensive tax stamp for every sale of marijuana, but these stamps were almost never issued by the federal government.

⁴⁸ See BONNIE & WHITEBREAD, *supra* note 44, at 49.

⁴⁹ See Craig Reinerman & Harry G. Levine, *Punitive Prohibition in America*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 321 (Craig Reinerman & Harry G. Levine eds., 1997) (arguing that marijuana became part of a proxy political war across cultures and generations).

⁵⁰ A Nixon aide has said that his antipathy towards marijuana was motivated by race. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER’S, Apr. 2016, <https://harpers.org/archive/2016/04/legalize-it-all/> [<https://perma.cc/4X33-Z3FF>] (According to John Ehrlichman, “We knew we couldn’t make it illegal to be either against the [Vietnam] war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news.”).

⁵¹ *Id.*

⁵² See John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, The Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 565–79 (1991).

introduced mandatory minimum sentences,⁵³ included drug offenses in some three-strike and two-strike sentencing schemes,⁵⁴ and approved sentencing guidelines that increased penalties for drug offenses and required sentencing based on overall drug distribution quantities (including un-convicted and acquitted conduct).⁵⁵ These changes were not prompted by an increase in drug abuse or sales—by the time legislatures had changed their laws, substance use rates were in decline.⁵⁶ Rather, changes in laws dovetailed with racialized panic about drug use.⁵⁷

B. A RACIALLY DISPARATE REGIME

The history of drug law broadly, and marijuana law specifically, is thus one that has been shaped by race and by a desire to characterize persons associated with illicit substances as “other.”⁵⁸ It is thus not particularly surprising that racial minorities are more likely to be convicted of drug offenses. These disparities are not unique to drug offenses, and there is a rich empirical literature documenting differing outcomes by race at every discretionary stage of criminal prosecution, from temporary detention and

⁵³ See, e.g., 21 U.S.C. § 841(b)(1)(B) (1988), <http://cdn.loc.gov/service/ll/uscode/uscode1988-00802/uscode1988-008021013/uscode1988-008021013.pdf> [<https://perma.cc/2CMH-MFDD>] (imposing mandatory five-year minimum period of imprisonment for possession of 5 grams of crack-cocaine).

⁵⁴ See, e.g., 21 U.S.C. § 841(b)(1)(A) (1988), <http://cdn.loc.gov/service/ll/uscode/uscode1988-00802/uscode1988-008021013/uscode1988-008021013.pdf> [<https://perma.cc/2CMH-MFDD>] (imposing mandatory term of life imprisonment for any person violating § 841(b)(1)(A), 845, 845(a), or 845(b) after two or more previous convictions).

⁵⁵ See, e.g., 28 U.S.C. § 991(b) (1988), <http://cdn.loc.gov/service/ll/uscode/uscode1988-01202/uscode1988-012028058/uscode1988-012028058.pdf> [<https://perma.cc/Z7UR-LP5V>] (detailing the purpose of the then newly congressionally created United States Sentencing Commission); see also U.S. SENTENCING COMM’N, 102D CONG., SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23 (1991), <https://www.ncjrs.gov/pdffiles1/Digitization/137910NCJRS.pdf> [<https://perma.cc/WN6G-FDC4>] (explaining that “the total quantity of drugs distributed should influence the sentence,” and not the defendant’s degree of responsibility).

⁵⁶ See Ahrens, *supra* note 6, at 852–59 (detailing dynamics of and lack of policy basis for this round of drug crackdowns).

⁵⁷ See Powell & Hershenov, *supra* note 52, at 559–64, 568.

⁵⁸ See *infra* Part I.A.

investigation,⁵⁹ to arrest, to pretrial detention, to conviction, to sentencing.⁶⁰ Those disparities are particularly striking in the context of drug offenses, however, because rates of drug use tend to be constant by race, but arrest and conviction rates diverge dramatically.⁶¹ Part of the reason for this disparity may be that while violent and property offenses generally have identified victims who must in some way be addressed or accommodated, drug offenses generally do not; decisions about who to arrest and how to prosecute therefore reflect decisions about patrolling and investigating more than they do actual underlying offense rates.⁶²

The figures for marijuana arrests are particularly stark. While black and white Americans use marijuana at about the same rate, black Americans are 3.73 times more likely to be arrested for marijuana offenses.⁶³ Even in states that now have legalized marijuana, arrests for people whose behavior remains regulated by criminal statute—unlicensed sellers and underage users—remains racially disproportionate, and white residents in some states have benefited disproportionately from legalization because they have dominated cannabis commerce.⁶⁴

⁵⁹ Latinx and black suspects detained by police during traffic stops and on-foot encounters are more likely to be searched than white suspects. See Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers' Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUST. Q. 49, 49–90 (2004); Patricia Warren et al., *Driving While Black: Bias Processes and Racial Disparity in Police Stops*, 44 CRIMINOLOGY 709, 709–38 (2006).

⁶⁰ Members of racial minority groups are more likely to experience pretrial detention—empirical studies suggest that they are more likely to receive bond; that bond amounts may be higher; that bond conditions may be more stringent; and that they will spend longer in pretrial detention where they cannot make bond. See, e.g., Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 170–92 (2005).

⁶¹ See, e.g., Maia Szalavitz, *Study: Whites More Likely to Abuse Drugs than Blacks*, TIME MAG., Nov. 7, 2011, <http://healthland.time.com/2011/11/07/study-whites-more-likely-to-abuse-drugs-than-blacks/> [https://perma.cc/45HW-X2S2].

⁶² See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1076 (2015); Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 686–89 (2015).

⁶³ See AM. CIV. LIB. UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* (2013). Arrest rates and conviction rates clearly are not the same thing—many arrests never end in conviction, and arrests may be effectuated for reasons other than an intention to secure a criminal conviction. See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 331 (2016) (noting that arrests may be effected as a formal commencement to criminal proceedings, but also as a means of disrupting ongoing criminal activity).

⁶⁴ The Drug Policy Alliance (a pro-drug-legalization group) has documented that although arrests have declined for all races in states that have legalized marijuana, racial disparities in arrest rates hold firm. See DRUG POLICY ALLIANCE, *FROM PROHIBITION TO PROGRESS: A STATUS REPORT ON MARIJUANA LEGALIZATION* 5 (2018), <http://www.drugpolicy.org/sites/default>

C. THE MOVEMENT TOWARDS MARIJUANA LEGALIZATION

Twenty-three years ago, marijuana was formally illicit for all purposes in all states and under federal law; as this section outlines, the legal landscape for marijuana has changed rapidly and reflects broader trends in criminal law reform. A minority of states have legalized recreational marijuana, but it is likely, given high public support for legalization, that more jurisdictions will follow soon.⁶⁵ The formal transformation of marijuana from the subject of harsh criminal penalties to a legitimate legal enterprise is relatively recent—the first states to legalize marijuana for general recreational use did not do so until 2012.⁶⁶ For decades prior to that, however, many states were reducing, transforming, or eliminating criminal convictions for low-level marijuana possession offenses, either as a matter of state law or as an issue of locally-exercised prosecutorial discretion.⁶⁷ Legalization of recreational marijuana followed on the heels of medical marijuana legalization, which commenced about fifteen years prior and provided legal marijuana access to a restricted population.⁶⁸ This section describes that path of marijuana legalization.

In the years prior to formal legalization of recreational marijuana, a number of jurisdictions had either effectively legalized personal marijuana use or had essentially converted simple possession of marijuana into a civil offense. Oregon was the first state to do so, decriminalizing possession of small amounts of marijuana in 1973, and other jurisdictions have pursued similar half-way policies in the decades since.⁶⁹ For example, some

ault/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf [https://perma.cc/3Z45-XD C2] (documenting dramatic declines in marijuana arrest rates in states that have legalized). The Colorado Department of Public Safety reported on post-legalization trends in the state and showed that the rate of arrest for white residents under the new legalization regime had declined at a faster rate than that for black residents. *See* COLORADO DEP'T OF PUB. SAFETY, MARIJUANA LEGALIZATION IN COLORADO: EARLY FINDINGS 5 (2016), <http://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf> [https://perma.cc/ER8U-UDSN] (noting that the arrest rates for marijuana offenses declined 51% for white residents since legalization, but declined 33% for people the state classifies as Hispanic and 25% for black residents).

⁶⁵ In answer to the question, “do you think the use of marijuana should be made legal, or not?” in 1969, 84% of Americans responded that it should be illegal, while 12% favored legalization. *See* Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RESEARCH CENTER (Nov. 14, 2019), <http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/> [https://perma.cc/2HN8-UDGV]. Around 2010, support for marijuana legalization became the majority position; by 2018, it had reached 62%. *See id.* Younger respondents favor legalization more than older respondents, and Democrats and independents favor legalization more than Republicans, but even Republican voters are almost evenly split. *Id.*

⁶⁶ *See infra* notes 85–86 and accompanying text.

⁶⁷ *See infra* notes 70–72 and accompanying text.

⁶⁸ *See infra* notes 81–83 and accompanying text.

⁶⁹ *See* OR. REV. STAT. § 475.864(3) (2015) (repealed 2017 by 2017 Or. Laws c. 21 § 126).

jurisdictions have pursued no-arrest or no-prosecution policies for personal-use marijuana possession.⁷⁰ Others have permitted some form of prosecution, but by policy disposed of simple possession of marijuana charges by making them fine-only offenses.⁷¹ Jurisdictions did so for a variety of reasons: resource constraints,⁷² diminishing public support for criminalization,⁷³ acknowledgement of social disparities,⁷⁴ and genuine conviction that low-level marijuana offenses were not worthy of real criminal

⁷⁰ A district attorney's office might de facto decriminalize marijuana under the stewardship of its particular elected lead prosecutor, for example, but that policy would be subject to change by a new lead prosecutor. Such policies remain a popular tactic today. *See, e.g.,* Tim Prudente, *Baltimore Will Stop Prosecuting Marijuana Possession, Mosby Announces*, BALT. SUN, Jan. 30, 2019, <http://www.baltimoresun.com/news/maryland/crime/b-s-md-mosby-marijuana-prosecution-policy-20190129-story.html> [https://perma.cc/7WXA-2KEW].

⁷¹ Oregon began the decriminalization process in 1973 by reducing the penalty for possession of less than one ounce of marijuana to a \$100 fine. *See* OR. REV. STAT. § 475.864(3) (1973) (repealed 2017 by 2017 Or. Laws c. 21 § 126). Other jurisdictions similarly have converted low-level marijuana offenses into violation-level fine-only offenses. *See, e.g.,* Henry Glass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCI. MONITOR, July 17, 2017, <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor> [https://perma.cc/S8ND-WHCN] (new District Attorney in Nueces County, Texas instituted policy whereby misdemeanor marijuana offenses would be disposed of via a \$250 fine and a drug class).

⁷² *See, e.g.,* Brian X. McCrone, *Marijuana Criminal Cases Dropped En Masse by Philadelphia District Attorney*, NBC PHILA. (Feb. 15, 2018), <https://www.nbcphiladelphia.com/news/local/Marijuana-Criminal-Cases-Dropped-En-Masse-by-Philadelphia-District-Attorney-Larry-Krasner-474228023.html> [https://perma.cc/SK23-2FKK]; Brian Rogers, *Local, State Officials Clash Over District Attorney's Marijuana Policy*, HOUS. CHRON., Feb. 22, 2017, <https://www.pressreader.com/usa/houston-chronicle/20170217/281479276174559> [https://perma.cc/7R93-2DC5].

⁷³ *See, e.g.,* Tony Rizzo & Glenn E. Rice, *Jackson County Prosecutor Stops Charging Marijuana Possession Cases, With Exceptions*, KAN. CITY STAR, Nov. 16, 2018, <https://www.kansascity.com/news/local/crime/article221595600.html> [https://perma.cc/5CK6-W5D3] (lead prosecutor in Jackson County noted that juries have changed their attitudes toward marijuana offenses).

⁷⁴ *See, e.g.,* Julie Fine, *Cruezot Offers Insight into How He Will Run Dallas County District Attorney's Office*, NBC FORT WORTH (Jan. 1, 2019), <https://www.nbcdfw.com/news/local/dallas-county-da-swears-in-prosecutors-and-investigators/9641/> [https://perma.cc/4WL R-YTM9] (new District Attorney noted that most people prosecuted for first-time marijuana offenses are poor).

treatment.⁷⁵ De facto decriminalization of marijuana is not legalization,⁷⁶ and no jurisdiction applied the same standards to felony marijuana offenses, but the current marijuana legalization movement was preceded by “soft” decriminalization for some time (an approach not seen with other drugs such as cocaine or heroin). In many jurisdictions where formal legalization efforts have stalled, prosecutors and legislators continue to pursue either de facto⁷⁷ or, in some cases, formal decriminalization.⁷⁸

Early efforts to formally legalize marijuana focused largely on permitting people with various ailments to obtain marijuana via prescription, and in jurisdictions that have legalized recreational marijuana use, medical marijuana legalization generally came first.⁷⁹ California became the first state to do so; voters approved the legalization of marijuana for medical use via Proposition 215 in 1996.⁸⁰ Alaska, Oregon, and Washington quickly

⁷⁵ See, e.g., Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES, July 8, 2014, <https://www.nytimes.com/2014/07/09/ny-region/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html> [<https://perma.cc/P97E-8V3E>] (Brooklyn DA limited marijuana prosecutions because of the problems convictions create with “jobs, housing and school for defendants”); Rebecca Rosenburg, *Manhattan DA's New Marijuana Policy Set to go into Effect*, N.Y. POST, July 31, 2018, <https://nypost.com/2018/07/31/manhattan-das-new-marijuana-policy-set-to-go-into-effect/> [<https://perma.cc/J7MZ-J7TU>] (Manhattan DA's new non-prosecution policy based on finding “virtually no public safety rationale . . . and no moral justification for the intolerable racial disparities”).

⁷⁶ “Decriminalization” in the form of fine-only prosecution still leaves a person with a criminal record, although the person will not face a threat of incarceration or community supervision, and will not have a felony record (or, where decriminalization has converted simple possession into a violation-level offense, a misdemeanor record).

⁷⁷ See generally notes 72–76 (detailing some such efforts).

⁷⁸ See, e.g., John Hageman, *Marijuana Decriminalization Bill in the Works after ND Legalization Effort Fails*, GRAND FORKS HERALD, Nov. 23, 2018, <https://www.grandforksherald.com/news/government-and-politics/4532869-marijuana-decriminalization-bill-works-after-nd-legalization> [<https://perma.cc/9Y95-2QQ3>].

⁷⁹ The Food and Drug Administration has not tested marijuana for safety as generally required for prescription drugs. See *Researching the Potential Medical Benefits and Risks of Marijuana: Before the S. Comm. on Crime and Terrorism*, 114th Cong. (2016), <https://www.fda.gov/newsevents/testimony/ucm511057.htm> [<https://perma.cc/VA9F-FM5F>] (statement of Douglas Throckmorton, Deputy Director for Regulatory Programs, Center for Drug Evaluation & Research, Food & Drug Administration).

⁸⁰ See CAL. HEALTH & SAFETY CODE § 11362.5 (West. Supp. 2020). Proposition 215—the Medical Use of Marijuana Initiative or the Compassionate Use Act—was preceded by legislation that similarly would have legalized medical marijuana in California; that legislation was vetoed twice by then-governor Pete Wilson. See Dennis Romero, *Dueling Initiatives Cloud Legalization Bid*, L.A. TIMES, Dec. 11, 1995, http://articles.latimes.com/1995-12-11/news/ls-12856_1_medical-marijuana [<https://perma.cc/EE6B-TUHE>]. California voters approved the initiative by about 55.58%. See *Votes For and Against November 5, 1996*,

followed in 1998, approving medical marijuana use via statewide popular ballot processes.⁸¹ States have steadily legalized marijuana for medical purposes since. To date, thirty-three states have legalized medical marijuana use; support for medical marijuana became so widespread that Utah—a state generally noted for religion-based substance prohibition—legalized medical marijuana in the last election cycle.⁸² While initial efforts at medical marijuana legalization generally involved ballot initiatives, many states are now legalizing medical marijuana through state legislative processes.⁸³

In 2012, Colorado⁸⁴ and Washington⁸⁵ became the first states to legalize recreational marijuana. In both states, as was the case with early medical marijuana reforms, the law changed through ballot initiative rather than through the state legislative process.⁸⁶ Legalization in each state combined the redrafting of criminal law to permit the legal possession, cultivation, and

Statewide Ballot Measures and Constitutional Amendments, California Secretary of State, <https://elections.cdn.sos.ca.gov/sov/1996-general/votes-for-against.pdf> [https://perma.cc/6UKD-2UPV].

⁸¹ See ALASKA STAT. ANN. 17 § 1, 17.35.010–17.35.080 (West 2020); OR. REV. STAT. ANN. § 475B.785 (West 2020); WASH. REV. CODE ANN. 69.51A (West 2020). Voters in Alaska approved Ballot Measure 8, an indirect state statute to legalize medical marijuana use, by 58%. See *Alaska Medical Marijuana Act, Measure 8 (1998)*, BALLOTPEDIA, [https://ballotpedia.org/Alaska_Medical_Marijuana_Act_Measure_8_\(1998\)](https://ballotpedia.org/Alaska_Medical_Marijuana_Act_Measure_8_(1998)) [https://perma.cc/VJN7-TD89]. Oregon voters approved Oregon Ballot Measure 67, The Oregon Medical Marijuana Act, by about 54.7%. See *Oregon Medical Marijuana Act, Measure 67 (1998)*, BALLOTPEDIA, [https://ballotpedia.org/Oregon_Medical_Marijuana_Act_Measure_67_\(1998\)](https://ballotpedia.org/Oregon_Medical_Marijuana_Act_Measure_67_(1998)) [https://perma.cc/56NP-9JAD]. Voters in Washington approved Initiative 692, The Washington Medical Marijuana Initiative, by about 59%. See *Washington Medical Marijuana, Initiative 692 (1998)*, BALLOTPEDIA, [https://ballotpedia.org/Washington_Medical_Marijuana_Initiative_692_\(1998\)](https://ballotpedia.org/Washington_Medical_Marijuana_Initiative_692_(1998)) [https://perma.cc/7HJE-HQXF].

⁸² As discussed below, *infra* notes 84–89, Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington, and the District of Columbia have all legalized recreational marijuana use, and those states in addition permit the medical use of marijuana. An additional twenty-three states have legalized medical marijuana but not recreational marijuana: Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, and West Virginia.

⁸³ Medical cannabis was approved by ballot measure (in chronological order) in twelve states: California, Oregon, Alaska, Washington, Maine, Nevada, Colorado, Montana, Michigan, Arizona, Missouri, and Utah. State legislatures approved medical cannabis (in chronological order) in fourteen states: Hawaii, Vermont, Rhode Island, New Mexico, New Jersey, Delaware, Connecticut, New Hampshire, Illinois, Minnesota, New York, Pennsylvania, Ohio, and West Virginia.

⁸⁴ See COLO. CONST. art. XVIII § 16(3)(d) (West 2019) (effective Dec. 10, 2012).

⁸⁵ See WASH. REV. CODE ANN. § 69.51A.010 (West 2019) (effective July 24, 2015).

⁸⁶ Both states approved legalization through a popular voter initiative. See *supra* notes 81–82.

sale of cannabis as well as the creation of a regulated and taxed legal cannabis industry.⁸⁷ Since 2012, nine other states have followed suit; recreational marijuana is legal in ten states and the District of Columbia.⁸⁸ So far, most states that have legalized marijuana for recreational use have done so by ballot initiative, reflecting broad public consensus in support of legalization.

A number of additional states are considering legalization of recreational marijuana in 2019 via legislative action.⁸⁹ States that already have legalized recreational marijuana use also generally maintain medical marijuana regimes, which cover different populations of cannabis users.⁹⁰ For example, persons under twenty-one are barred from recreational marijuana use in all states that have legalized the drug, but may nevertheless be eligible for medical marijuana prescriptions under some regimes.⁹¹

II. RATIONALES FOR AND CONSEQUENCES OF LEGALIZATION

Persons advocating for changes in marijuana laws stress a variety of themes in their successful quest. Some of those themes are pragmatic and policy oriented. Many advocates, for example, argue that enforcement of marijuana laws is extremely expensive, with valuable state revenues

⁸⁷ See COLO. CONST. art. XVIII § 16(3)(d); WASH. REV. CODE ANN. 69.51A.010 (West 2019) (effective July 24, 2015); see also ALASKA STAT. ANN. § 17.38.010 (2018) (outlining the regulation of marijuana); ALASKA ADMIN. CODE tit. 3, § 306.370 (2018) (Marijuana Control Board rules for cannabis retail licensing).

⁸⁸ Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington, and the District of Columbia have all legalized recreational marijuana use. See, e.g., CAL. HEALTH & SAFETY CODE § 11363.1 (West 2019) (effective June 27, 2017).

⁸⁹ The New Jersey legislature passed bills to legalize recreational marijuana at the end of 2018, and the Governor in Connecticut made marijuana legalization part of his political platform. See Alexandra Hutzler, *Marijuana Legalization 2019: Which States Will Consider Legal Weed in Year Experts Predict Will Be 'Real Game-Changer,'* NEWSWEEK, Jan. 1, 2019, <https://www.newsweek.com/which-states-legalization-marijuana-2019-1275736> [<https://perma.cc/JP35-JV76>]. New York Governor Andrew Cuomo expressed interest in moving forward with legalization. See *id.*

⁹⁰ See, e.g., WASH. REV. CODE §§ 69.51A–69.51A.901 (2007); WASH. REV. CODE §§ 69.51A.010, 69.51A.040 (2007) (collectively laying out ongoing scheme for regulating medical marijuana).

⁹¹ Illinois' medical marijuana scheme is fairly typical, for example—in Illinois, families can obtain medical marijuana registry cards for minor patients who have qualifying conditions. See *Minor Qualifying Patient Application*, ILL. DEP'T OF PUB. HEALTH, <http://www.dph.illinois.gov/topics-services/prevention-wellness/medical-cannabis/minorqualifyingpatients> [<https://perma.cc/XL5J-XTL8>].

allocated for policing, prosecution, and incarceration.⁹² They point out that enforcement of marijuana laws, in addition to being an expense, distracts police and courts from crime that is more socially significant.⁹³ At the same time, they argue, expensive enforcement is not actually reducing marijuana use—marijuana has been popular even in the face of enforcement.⁹⁴ What criminalization has done, in contrast, is create collateral crime, as people engaged in illicit drug trade engage in violence and criminal organization in order to protect that trade.⁹⁵

Advocates have also argued that the people who generally face arrest and punishment for marijuana offenses are poor and/or members of minority communities—meaning that enforcement is not just ineffective, but unjust.⁹⁶

⁹² See, e.g., Kathleen Gray, *Proposal 1: Marijuana Legalization Passes in Michigan*, DETROIT FREE PRESS, Nov. 6, 2018, <https://www.freep.com/story/news/politics/elections/2018/11/06/marijuana-legal-michigan-results/1835274002/> [<https://perma.cc/4DCQ-G9E5>] (spokesperson for legalization advocacy group supported state initiative, arguing that “[l]egalization of marijuana will end the unnecessary waste of law enforcement resources used to enforce the failed policy of prohibition while generating hundreds of millions of dollars each year for Michigan’s most important needs”).

⁹³ See, e.g., Brian Rogers, *DA’s Pot Program Draws Mixed Reaction, Local, State Officials Clash Over District Attorney’s Marijuana Policy*, HOUS. CHRON., Feb. 22, 2017, <https://www.houstonchronicle.com/news/houston-texas/houston/article/DA-s-pot-program-draws-mixed-reaction-10939161.php> [<https://perma.cc/SS3E-Q4X3>] (“District Attorney Kim Ogg said the county’s resources would be better spent arresting serious criminals such as burglars, robbers and rapists. ‘We have spent in excess of \$250 million, over a quarter-billion dollars, (over 10 years) prosecuting a crime that has produced no tangible evidence of improved public safety,’ she said. ‘We have disqualified, unnecessarily, thousands of people from greater job, housing and educational opportunities by giving them a criminal record for what is, in effect, a minor law violation.’”); Rosenburg, *supra* note 75 (“Our research has found virtually no public safety rationale for the ongoing arrest and prosecution of marijuana smoking and no moral justification for the intolerable racial disparities that underlie enforcement.”).

⁹⁴ See, e.g., *Marijuana Legalization and Regulation*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/marijuana-legalization-and-regulation> [<https://perma.cc/55WM-BGAX>] (listing arguments for legalization and harping heavily on commonality of drug and fiscal and safety benefits of legalizing and regulating).

⁹⁵ See, e.g., Jamie Doward, *Legal Marijuana Cuts Violence Says U.S. Study, as Medical Use Laws See Crime Fall*, GUARDIAN, Jan. 13, 2018, <https://www.theguardian.com/world/2018/jan/14/legal-marijuana-medical-use-crime-rate-plummets-us-study> [<https://perma.cc/5G9A-YM5L>].

⁹⁶ At a debate over Washington’s initiative that included Seattle City Attorney Pete Holmes, a participant minister argued that the war on drugs had been a weapon of “institutionalized racism” and “a war on black and brown people.” Jonathan Martin, *Lively Debate Over I-501, The Marijuana Measure, Draws Big Crowd at the UW*, SEATTLE TIMES, Oct. 11, 2012, <https://www.seattletimes.com/seattle-news/lively-debate-over-i-502-the-marijuana-measure-draws-big-crowd-at-the-uw/> [<https://perma.cc/LUD9-K5QX>]; see also

Others say that as long as people will use marijuana, and as long as there is a market for it, it makes sense to treat marijuana similarly to other substances, like alcohol and tobacco, that are commonly used for recreation but carry some deleterious effect.⁹⁷ Legislators can create a regulatory scheme to control production and sales;⁹⁸ criminalize the aspects that are most socially harmful (like driving under the influence or providing substances to minors);⁹⁹ and, most importantly, tax it all at great financial benefit to the state.¹⁰⁰

State voters and legislatures have quickly expanded marijuana legalization despite the ongoing federal prohibition of all marijuana use (including medical use) and concurrent federal jurisdiction over pertinent criminal law pursuant to the Controlled Substances Act.¹⁰¹ States largely

Christopher Ingraham, *Sen. Cory Booker Puts Marijuana Legalization at the Center of his New Racial Justice Bill*, WASH. POST, Aug. 1, 2017, <https://www.washingtonpost.com/news/wonk/wp/2017/08/01/cory-booker-puts-marijuana-legalization-at-the-center-of-his-new-racial-justice-bill/> [<https://perma.cc/5C5A-3VPU>] (“For decades, the failed War on Drugs has locked up millions of nonviolent drug offenders — especially for marijuana-related offenses — at an incredible cost of lost human potential, torn-apart families and communities, and taxpayer dollars.”) (internal quotations omitted); Eve Peyser, *Does your Senator Think Weed Should be Legal?*, VICE (Apr. 20, 2018), https://www.vice.com/en_us/article/59jqx3/which-senators-by-state-support-legal-weed [<https://perma.cc/K58D-NQ9M>] (quoting Hawaii Senator Brian Schatz: “[W]hile white people and people of color use marijuana at the same rate, people of color are four times more likely to be arrested. So this is a matter of civil justice”); Rosenberg, *supra* note 75 (emphasizing racial disparities). There is a possible counter-narrative in some jurisdictions; some legalization advocates have argued that legalization will curtail the power of predatory “cartels,” which likely are racialized as Latinx. See, e.g., Tom Tancredo & John Southers, *Counterpoint: Marijuana Legalization Amendment*, THE GAZETTE, Sept. 21, 2012, https://gazette.com/news/point-counterpoint-marijuana-legalization-amendment/article_141054ea-2b86-5f89-a838-2463257a1b39.html [<https://perma.cc/7MRG-ZECT>] (“[N]arcoterrorists, who have operatives spread throughout the U.S., are wreaking havoc on our southern borders and are a menace to American businesses with operations in Mexico and South America.”).

⁹⁷ See, e.g., *No High Risk: Marijuana May Be Less Harmful Than Alcohol, Tobacco*, NBC NEWS (Feb. 11, 2015), <https://www.nbcnews.com/storyline/legal-pot/marijuana-safer-alcohol-tobacco-study-shows-n312876> [<https://perma.cc/DRA5-NEM8>].

⁹⁸ See, e.g., *Congressman Introduces Federal Bill to Regulate Marijuana Like Alcohol*, FOX 59 (January 13, 2019), <https://fox59.com/2019/01/13/congressman-introduces-federal-bill-to-regulate-marijuana-like-alcohol/> [<https://perma.cc/UCF6-4TAV>].

⁹⁹ Washington’s recreational marijuana legalization process, for example, included redrafting the state’s driving under the influence statute to deal more precisely with marijuana usage. See WASH. REV. CODE § 46.61.502 (eff. July 23, 2017).

¹⁰⁰ See, e.g., Zoe Chevalier, *Recreational Marijuana: A Business Boon for States?*, U.S. NEWS & WORLD REP., Aug. 1, 2018, <https://www.usnews.com/news/best-states/articles/2018-08-01/the-legalization-of-recreational-marijuana-an-economic-opportunity-for-states> [<https://perma.cc/TN4S-JCV9>].

¹⁰¹ 21 U.S.C. §§ 801–904 (West 2020).

enjoy latitude to shape criminal marijuana laws despite federal law because of the voluntary abstention on the part of the federal government; the Obama Administration's policy, as articulated in the Cole Memorandum, was not to prosecute generic marijuana offenses in jurisdictions that had legalized its use.¹⁰² The Trump Administration rescinded the Cole Memorandum, and then-Attorney General Jeff Sessions announced that marijuana remained a federal law enforcement priority.¹⁰³ Sessions did, however, offer that federal prosecutors still would not prosecute minor marijuana offenses, even though federal law continued to prohibit marijuana possession.¹⁰⁴ Federal prosecutors in states that have legalized generally seem uninterested in the prospect of prosecuting marijuana offenses.¹⁰⁵

The process that has produced recreational marijuana legalization provides particularly strong support for expunging or pardoning past marijuana convictions. As will be noted, constitutional litigation has spurred some of the most striking recent episodes of decriminalization;¹⁰⁶ such decriminalization is no less salient or compelling because it has been required by courts, but it does not necessarily reflect broad social consensus about the

¹⁰² This policy was announced in what has come to be known as the Cole Memorandum, issued by then-Deputy Attorney General James Cole to federal prosecutors. While the Cole Memorandum reminded federal prosecutors that marijuana remained illegal under federal law, and provided that federal prosecutors would continue to prioritize enforcement where enforcement implicated important federal priorities in eight specific areas (such as preventing the use of firearms in drug trafficking and ensuring that minors did not use marijuana), the memorandum also indicated that, outside of those prioritized categories, the federal government would permit states that had legalized marijuana to make their own enforcement decisions. Memorandum from James Cole, Deputy Att'y Gen. to All U.S. Att'ys (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/KN6B-EXBX>].

¹⁰³ Then-Attorney General Jeff Sessions issued a letter expressly rescinding the Cole Memorandum and all other prior marijuana-specific guidelines for federal prosecution, announcing that federal prosecutors should use only the general prosecution guidelines issued by his office. Memorandum from Jefferson B. Sessions III to All U.S. Att'ys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/3BV7-UZSE>].

¹⁰⁴ Max Greenwood, *Sessions Says Despite Rules Change Federal Prosecutors Will Not Take "Small Marijuana Cases,"* THE HILL (Mar. 10, 2018), <https://thehill.com/homenews/administration/377750-sessions-says-despite-rules-change-federal-prosecutors-will-not-take> [<https://perma.cc/L443-D9RT>].

¹⁰⁵ The U.S. Attorney for Colorado in fact announced that his office would not be changing its policies on marijuana prosecution after the Cole Memorandum was rescinded. See Kathleen Foody & Nicholas Riccardi, *Colorado U.S. Prosecutor: No Change after Sessions' Pot Shift*, U.S. NEWS & WORLD REP., Jan. 4, 2018, <https://www.usnews.com/news/best-states/colorado/articles/2018-01-04/ex-pot-czar-says-sessions-move-intended-to-create-chaos> [<https://perma.cc/J4QC-PPP5>].

¹⁰⁶ See *infra* notes 157–158.

underlying behavior. Similarly, when Congress or state legislatures decriminalize behavior, those legal changes do not necessarily reflect social consensus in support of the change—it is more likely, because legislators respond to the will of voters—but changes enacted by legislatures map imperfectly onto public priorities because our representative government does not require legislators to simply vote in the way the majority of constituents wish them to.

Marijuana legalization is not a counter-majoritarian move by reformist legislators educated about the harms of the War on Drugs or eager to raise revenues without raising general taxes. Instead, marijuana legalization has generally stemmed from popularly-approved state initiatives and propositions.¹⁰⁷ While laws obviously are equally valid and binding whether introduced by legislators or approved by voters, the fact that marijuana legalization has been adopted via initiative and proposition suggests that legalization reflects broad popular support for the notion that the underlying activity ought not to be punished by criminal law. Criminal convictions reflect social judgment—society disapproves of a particular activity such that it is willing to subject an individual to state-sponsored opprobrium and sanction.¹⁰⁸ This Article challenges the notion that drug laws generally, and marijuana laws specifically, reflect social consensus on the appropriate ways law and drugs should interact. Instead, laws criminalizing marijuana often reflected the agendas of individual politicians or narrow private interests.¹⁰⁹ The fact that the citizens of a state affirmatively choose to permit legal cultivation, use, and sale of marijuana provides a strong argument against continuing to saddle persons convicted in the past with the legal and social consequences of behavior the public now broadly approves.

¹⁰⁷ To date, Vermont and Illinois are the only states that have legalized recreational marijuana use through the legislative process rather than through a mechanism using direct voter approval. See Jason Lemon, *Vermont Recreational Marijuana Legalization, What is Legal and What is Not?*, NEWSWEEK, July 1, 2018, <https://www.newsweek.com/vermont-marijuana-legalization-what-legal-what-not-1003482> [<https://perma.cc/64YX-9GKW>]; Dan Petrella, *Illinois House Approves Marijuana Legislation Bill Backed by Gov. J.B. Pritzker*, CHI. TRIB., May 31, 2019, <https://www.chicagotribune.com/politics/ct-met-illinois-recreational-marijuana-legislation-20190531-story.html> [<https://perma.cc/VBN2-Z8R8>].

¹⁰⁸ This point is central to criminal sanctions literature and to most of my work. See, e.g., Ahrens, *supra* note 36, at 1697 (“The adoption of legislation aimed at bullying and cyberbullying is not just intended to combat the perceived problems, but to communicate that those problems are being taken seriously.”).

¹⁰⁹ See BONNIE & WHITEBREAD, *supra* note 44, at 13.

That broad approval translates into notable profits for new marijuana entrepreneurs, and sales in some states have crossed \$1 billion.¹¹⁰ States have issued thousands of licenses for marijuana producers, processors, transporters, and retailers.¹¹¹ Legal cannabis has become big business, which was a desired end product of legalization efforts, rather than a happy and unexpected side benefit.¹¹² Legalization efforts generally touted projected tax revenue that would be collected from newly legal marijuana enterprises and explicitly sold the idea of replacing the high public costs of the criminal enforcement of marijuana laws with an influx of taxes that would support education and other necessary public services.¹¹³ States have indeed collected substantial tax revenues (generally larger than initially projected) from ongoing marijuana sales, and those revenues have increased over time in the states that pioneered legalizing recreational marijuana.¹¹⁴ States adopt

¹¹⁰ California has seen \$2.75 billion in marijuana sales, while sales in Colorado are at \$1.56 billion and Washington State has reached \$1 billion. See Andrew DePietro, *Here's How Much Money States Are Raking In from Legal Marijuana Sales*, FORBES (May 4, 2018), <https://www.forbes.com/sites/andrewdepietro/2018/05/04/how-much-money-states-make-cannabis-sales/#4a9418a5f181> [https://perma.cc/HGD9-XD83]. The wild success of legal marijuana sales appears to be cutting into profits from illegal drug cartels. See Christopher Ingraham, *Legal Marijuana is Finally Doing What the Drug War Couldn't*, WASH. POST, Mar. 3, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/03/03/legal-marijuana-is-finally-doin-g-what-the-drug-war-couldnt/?utm_term=.8a44817ba55d [https://perma.cc/LK9A-737A].

¹¹¹ Washington State has issued more than 1,000 licenses for cannabis-specific businesses; of those, 507 have been for retail outlets; 167 for processors; 159 for producers; thirteen for marijuana cooperatives; and eleven for marijuana transporters. See WASH. STATE LIQUOR & CANNABIS BD.: ANNUAL REPORT, FISCAL YEAR 2017 10 (2017), https://lcb.wa.gov/sites/default/files/publications/annual_report/2017-annual-report-final2-web.pdf [https://perma.cc/89JH-DB34].

¹¹² As noted above, see *supra* note 88, marijuana decriminalization is consistently paired with legislation expressly creating a new, regulated, and taxed marijuana industry. Advocates for legalizing recreational marijuana consistently argued that legalization would create jobs and build business.

¹¹³ The Department of Revenue for the state of Colorado reports that in 2014, the state collected a total of \$67,594,323 in taxes, licenses, and fees related to marijuana; from January to November in 2018 (the latest point for which data was available for this Article), Colorado recorded \$244,907,128 in taxes, licenses, and fees. See Colorado Dep't of Rev., *Marijuana Tax Data*, <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data> [https://perma.cc/PT99-YC88]. Washington State's Liquor and Cannabis Board reports that in 2017, the state collected \$319 million in marijuana-related revenue; that figure was an increase from \$189 million in 2016 and \$65 million in 2015. See WASH. STATE LIQUOR & CANNABIS BD., *supra* note 111, at 16.

¹¹⁴ See, e.g., Aaron Smith, *The Legal Marijuana Industry Is Booming*, CNBC (Jan 31, 2018), <https://money.cnn.com/2018/01/31/news/marijuana-state-of-the-union/index.html> [https://perma.cc/59AW-2ZGT]; see also *infra* note 115.

specific taxes on marijuana sales that garner the majority of revenues¹¹⁵ but also collect money from other marijuana business sources, particularly through licenses and fees.¹¹⁶ So far, concerns about collateral financial costs of legalization—increased crime rates that might require greater state funding to address—do not appear to have been realized.¹¹⁷ Legalized marijuana thus has provided both economic benefit to people in the industry and broader benefit for people whose states have additional revenues that can be deployed for public use.

Not everyone has received equal benefit from or access to marijuana-related commerce. The licensing process for marijuana cultivators and sellers limits the numbers and types of individuals who can enter the market.¹¹⁸ The overwhelming majority of persons who have founded or who own cannabis businesses identify as white.¹¹⁹ The expenses of entering the

¹¹⁵ States put into place cultivation taxes, sales taxes, and/or excise taxes; the sales tax on marijuana in Washington is 37%, while Massachusetts levies a 6.25% sales tax on top of a 10.75% excise tax.

¹¹⁶ See, e.g., WASH. STATE LIQUOR & CANNABIS BD., *supra* note 111, at 16 (noting that of the \$319 million in marijuana-related revenues Washington State collected in 2018, all but \$4 million reflected marijuana-specific sales taxes).

¹¹⁷ See Rosie McCall, *Does Legalizing Pot Increase Crime Rates? It Hasn't in Colorado and Washington, A Study Has Found*, NEWSWEEK, Oct. 8, 2019, <https://www.newsweek.com/legalizing-pot-increase-crime-rates-colorado-washington-1463622> [<https://perma.cc/49J7-CVQ>] (reporting results of recent academic study and briefly mentioning earlier studies that reached similar conclusions).

¹¹⁸ As this Article explores below, see *infra* note 123, one limitation is that persons with past marijuana convictions are, in all but one legalization jurisdiction, barred from obtaining the necessary licenses to operate marijuana-related businesses.

¹¹⁹ Complete data has not been gathered on the racial breakdown, but the data that exists, consistently indicates that most marijuana business owners are white. *Marijuana Business Daily*, a publication aimed at persons in the legal marijuana industry, conducted a survey of 389 marijuana-related business owners and founder, determining that 81% were white, as compared to 5.7% Hispanic/Latinx; 4.3% black; 2.4% Asian; and 6.7% other. See Eli McVey, *Chart: Percentage of Cannabis Business Owners and Founders by Race*, MARIJUANA BUS. DAILY (Sept. 11, 2017), <https://mjbizdaily.com/chart-19-cannabis-businesses-owned-founded-racial-minorities/> [<https://perma.cc/TWC6-UV3D>]. Minority ownership rates vary from state to state, and the presence of minority owners in the marijuana industry seems to be driven primarily by California, where up to 40% of marijuana businesses are minority-owned. *Id.* These figures likely overstate the participation of racial minorities in businesses that directly cultivate, transport, or sell marijuana, however, as the survey included businesses that service direct marijuana vendors, like law offices or public relations firms. Other smaller and more geographically-specific surveys have reached similar conclusions. See Angela Bacca, *The Unbearable Whiteness of the Marijuana Industry*, ALTERNET (Apr. 1, 2015), <https://www.alternet.org/2015/04/incredible-whiteness-colorado-cannabis-business/> [<https://perma.cc/W7K C-9CS4>] (84% of major marijuana retailers in Denver were white in 2015 when surveyed); Michael Lyle, *Marijuana's Diversity Problem: Many Potential Black Entrepreneurs Are*

legal marijuana industry are formidable. Prospective business owners generally need to pay high licensing application and annual licensing fees,¹²⁰ and—in part because support for legalization derived from voter desire to fund other public projects with marijuana revenue—marijuana business owners also pay high taxes.¹²¹ Some jurisdictions—mindful of past inequalities in marijuana law enforcement—have made special efforts to include minority communities generally, and persons affected by the War on Drugs specifically, in marijuana commerce.¹²² The barriers to market entry for people with criminal convictions and without significant economic resources, however, remain formidable, so the communities that are profiting from legal marijuana are not the communities that were punished for marijuana activity pre-legalization.

III. THE CASE FOR CLEARING MARIJUANA CONVICTIONS

A. A CLIMATE OF REFORM

The movement to legalize marijuana and expunge or pardon marijuana convictions is only one part of a broader, recent trend towards incremental criminal justice reform. While incarceration rates increased at a steady pace since the early 1970s, they have levelled and modestly receded in the 2010s, in part because of changes in criminal law.¹²³ Voters in the November 2018

Being Left Out of the Budding Industry, VEGAS INC., July 17, 2017, <https://vegasinc.lasvegas.com/business/2017/jul/17/marijuanas-diversity-problem-many-potential-black/> [<https://perma.cc/5QRX-BULD>] (noting that of the 148 marijuana businesses licensed in Nevada, only five had black owners).

These statistics do not, however, necessarily reflect that rates of business ownership are significantly different in the marijuana industry as compared to other small businesses. The Census Bureau estimated that in 2014, about 17.5% of small businesses were owned by racial minorities. *See* Press Release, United States Census Bureau, Nearly 1 in 10 Businesses with Employees Are New, According to Inaugural Annual Survey of Entrepreneurs (Sept. 1, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-148.html> [<https://perma.cc/6632-WXXM>].

¹²⁰ The high cost of licensing can be preclusive. In reflecting on low rates of minority marijuana business ownership in Nevada, one black business owner said that “I think the \$250,000 [that applicants are required to be able to access in order to get a license] scared people off.” *See* Lyle, *supra* note 119.

¹²¹ *See* WASH. STATE LIQUOR & CANNABIS BD., *supra* note 111.

¹²² Oakland, California, for example, created an equity program to try to incorporate persons who either hail from neighborhoods significantly affected by drug prosecutions or who were themselves convicted of drug offenses. *See* Alex Halperin, *Cannabis Capitalism: Who is Making Money in the Marijuana Industry?*, THE GUARDIAN, Oct. 3, 2018, <https://www.theguardian.com/society/2018/oct/03/cannabis-industry-legalization-who-is-making-money> [<https://perma.cc/74CQ-5FPY>].

¹²³ *See supra* note 10.

election approved not just marijuana legalization propositions, but a number of other criminal justice reforms. Florida voters overwhelmingly approved a constitutional amendment to re-enfranchise persons convicted of felony offenses,¹²⁴ and voters across the country approved other ballot propositions designed to reduce the imprint of mass incarceration or to combat perceived excesses of police.¹²⁵ State legislatures continued to enact criminal justice reforms,¹²⁶ and new reform proposals have already featured in 2019.¹²⁷ Congress passed the FIRST STEP Act (which, among other things, retroactively applies the Fair Sentencing Act that had addressed sentencing disparities between powder and crack forms of cocaine) by bipartisan majorities with support from the president.¹²⁸ Openness to reform may

¹²⁴ Sixty-four percent of Florida voters voted in favor of Amendment 4, which restores voting rights to about 1.4 million persons convicted of felonies who had completed the terms of their sentences but were barred under the state's constitution from voting (the proposition excluded persons convicted of murder and sexual offenses). See Skyler Swisher, *Starting Today, Ex-Felons Can Sign Up to Vote in Florida*, SOUTH FLA. SUN SENTINEL, Jan. 8, 2019, <http://www.sun-sentinel.com/news/florida/fl-cb-amendment-4-explainer-20190107-story.html> [https://perma.cc/29UY-J6RG].

¹²⁵ Florida voters, in addition to approving Amendment 4, voted in favor of Amendment 11, repealing a state constitutional provision that barred legislators from amending criminal statutes retroactively by, for example, lowering or eliminating mandatory minimum sentences for particular offenses. See Frances Robles, *1.4 Million Floridians With Felonies Win Long-Denied Right to Vote*, N.Y. TIMES, Nov. 7, 2018, <https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html> [https://perma.cc/24LP-SF4B]. Louisiana voters overwhelmingly approved Amendment 2, eliminating non-unanimous jury verdicts that had long been criticized as designed to reduce the impact of black jurors. See Kevin McGill & Rebecca Santana, *Louisiana Votes to End Non-Unanimous Jury Verdicts*, U.S. NEWS & WORLD REP., Nov. 6, 2018, <https://www.usnews.com/news/best-states/louisiana/articles/2018-11-06/louisiana-decides-future-of-non-unanimous-jury-verdicts> [https://perma.cc/CK7N-B7NG].

¹²⁶ Probably the most high-profile reform was California's decision to retroactively change its felony murder statute so that a person can only be convicted of murder where they killed, intended to kill, or acted with reckless indifference to human life; a person cannot be convicted of felony murder under other theories of accomplice liability, which both reduces the number of persons prosecutable for felony murder and makes eligible for release a number of persons who were convicted under prior law. See Jazmine Ulloa, *California Sets New Limits on Who Can Be Charged with Felony Murder*, L.A. TIMES, Sept. 30, 2018, <https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html> [https://perma.cc/ZM56-Y26M].

¹²⁷ For example, New Mexico's legislature is considering House Bill 57, which would permit persons incarcerated in New Mexico—like similarly-situated people in Maine and Vermont—to vote while still incarcerated. See New Mexico HB 57, 54th Leg. Sess. (2019).

¹²⁸ The FIRST STEP Act changes some incarceration conditions for persons in federal facilities—incarcerated persons will have access to expanded job training; will no longer be shackled if pregnant; and are to be housed, if possible, within 500 miles of their families. The

reflect a variety of inputs, including declining state budgets, growing awareness of the racial impacts of policing and prosecution, and concern about the effects of criminal justice.¹²⁹ Whatever the sources and motivations, government actors and voters alike appear poised to consider how to transform criminal justice at the present crossroads. Marijuana convictions offer an excellent opportunity to think through how to deal with the pervasive effects of mass incarceration.

B. CURRENT EFFORTS TO ERASE OR LIMIT MARIJUANA CONVICTIONS

A number of jurisdictions have already begun the process of vacating and expunging marijuana convictions as “a necessary step to right the wrongs of what was a failed war on drugs.”¹³⁰ The clearance of past convictions for now-legal behavior has been framed as one of justice and fairness.¹³¹ These initial efforts should be expanded to other legalized jurisdictions (and to new

Act also changes the sentences for some incarcerated persons by retroactively applying the Fair Sentencing Act of 2010 to convicted persons sentenced under the prior, significantly harsher guidelines for crack cocaine versus powder cocaine. The Act finally reduces the possible sentencing exposure for some convicted persons going forward by offering judges more discretion to apply the Sentencing Guidelines’ safety valve. *See* H.R. 5682, 115th Cong. (2018).

¹²⁹ On the importance of breaking out of our recent politics of overcriminalization and the reasons for optimism that we might be prepared to do so, see, for example, BARKOW, *supra* note 35.

¹³⁰ Mayor Jenny Durkan made this statement in announcing Seattle’s expungement policy at a news conference, offering further that “For thousands of people in Washington State, a misdemeanor conviction had huge implications: It could be a barrier to housing, to getting credit, to getting good jobs and education. Gene Johnson, *Seattle Clears Pot Convictions, Following San Francisco Lead*, AP NEWS, Feb. 8, 2018, <https://apnews.com/dca0740b58de4ff4be6ec1af07df45ee/Seattle-clears-pot-convictions,-following-San-Francisco-lead> [<https://perma.cc/E7NA-YPNJ>]. Denver Mayor Michael Hancock, in announcing a similar policy discussed *supra* note 30, offered in support of expungement the argument that “[f]or too long, the lives of low-income residents and those living in our communities of color have been negatively affected by low-level marijuana convictions . . . [t]his is an injustice that needs to be corrected, and we are going to provide a pathway to move on from an era of marijuana prohibition that has impacted the lives of thousands of people.” Andrew Kenney, *Denver Will Help Expunge Marijuana Convictions for 10,000-plus People*, DENVER POST, Dec. 4, 2018, <https://www.denverpost.com/2018/12/04/denver-expunge-marijuana-records/> [<https://perma.cc/2H5V-M7UQ>].

¹³¹ New York City Mayor Bill de Blasio recently released a report advocating both legalization and expungement, arguing that “[t]he time has come to rewrite the rules, to break the mold of the past, to repair and redeem the lives of people who are treated unjustly.” Matthew Chayes, *NYC Mayor Backs Marijuana Legalization and Conviction Expungement, Governing the States and Localities*, TRIB. NEWS SERV. (Dec. 21, 2018), <http://www.governing.com/topics/public-justice-safety/tns-nyc-mayor-marijuana-legalization.html> [<https://perma.cc/TG5N-3FVF>].

jurisdictions that legalize) and should also be expanded beyond the categories of offenses now eligible for clearance.

California's approach to conviction clearance is the most extensive. In 2018, California adopted legislation that requires the expungement of certain marijuana convictions;¹³² the state adopted this legislation at the same time that it legalized recreational marijuana, highlighting how inextricable the issues of past conviction and present legalization have become.¹³³ The legislation does not require individuals who have past convictions to initiate the ordinary expungement process in order to clear their records.¹³⁴ Instead, the legislation requires the California Department of Justice to review criminal records in order to identify eligible convictions; misdemeanor possession convictions (where the amount in personal possession would be legal now under California law) are generally automatically expunged, while felony convictions may be reduced to misdemeanor convictions.¹³⁵ This provision applies to persons currently serving sentences for those felony convictions, which means some persons convicted of marijuana offenses may become eligible for release.¹³⁶

While California probably has the most comprehensive expungement program, it was not the first state that decided to relieve people from the effects of past convictions in light of legalization. When Oregon legalized recreational marijuana in 2014, legalization was quickly followed by legislation that permitted persons with minor marijuana convictions to petition to have them sealed.¹³⁷ Like California, Oregon provides that persons can petition to reduce some marijuana felonies to misdemeanors and, after recent amendments, can petition to seal some felonies.¹³⁸ Colorado,

¹³² See Assemb. B. 1793, 2018 Leg., Reg. Sess. (Cal. 2018) (adopting bill to automatically expunge certain marijuana offenses where behavior is now legal under California law); CAL. HEALTH & SAFETY CODE § 11361.9 (2018) (effective Jan. 1, 2019) (code version of assembly bill).

¹³³ The Drug Policy Alliance described the measure as “reparative justice.” See Sophie Quinton, *In These States, Past Marijuana Convictions Can Go Away*, THE PEW FOUND.: STATELINE (Nov. 20, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/20/in-these-states-past-marijuana-crimes-can-go-away> [<https://perma.cc/Z2UH-S3QK>].

¹³⁴ CAL. HEALTH & SAFETY CODE § 11361.9 (2018) (effective Jan. 1, 2019).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Noel Crombie, *Some Felony Pot Convictions Can be Sealed under New Oregon Law*, THE OREGONIAN, Nov. 10 2015, https://www.oregonlive.com/marijuana/2015/11/most_old_marijuana_convictions.html [<https://perma.cc/R5V6-66ZJ>]. The Oregon expungement process requires applicants to pay fees. See OR. REV. STAT. § 137.225 (West 2019).

¹³⁸ See *id.*

which legalized recreational marijuana in 2012,¹³⁹ passed legislation to permit persons convicted of low-level possession offenses (where underlying conduct would be entirely legal under current Colorado law) to apply for expungement.¹⁴⁰ Persons convicted under Colorado law must file a court petition and pay fees in order to secure such an expungement.¹⁴¹

Washington State started down a different path toward tackling past convictions.¹⁴² Governor Inslee announced that the executive will use its pardon power to forgive past convictions; eligible convictions will be those between 1998 and 2012 (the year of legalization), and the only convictions eligible for action will be misdemeanor possession convictions on otherwise-empty criminal records.¹⁴³ The process does not appear to contemplate any sort of notice or objection component, nor does it appear to contemplate an exercise of discretion beyond that offered to set the eligibility criteria for the pardon program itself. The pardon program provides an online link where people with eligible convictions can apply through a much-streamlined pardon process; it does rely on eligible persons to come forward on their own.¹⁴⁴ The state legislature has more recently passed legislation that will offer an expungement process for low-level convictions similar to that provided in other states.¹⁴⁵

¹³⁹ See COLO. CONST. art. XVIII § 16(3)(d) (West 2019) (effective Dec. 10, 2012).

¹⁴⁰ See Lee V. Gaines, *How Do You Clear a Pot Conviction from Your Record?*, THE MARSHALL PROJECT, Nov. 27, 2017, <https://www.themarshallproject.org/2017/11/27/how-do-you-clear-a-pot-conviction-from-your-record> [<https://perma.cc/MRB9-MJ8D>] (discussing Colorado statute and putting it in context).

¹⁴¹ So far, the state has not agreed to identify convictions; individuals wishing to be pardoned would need to take initiative. While some jurisdictions in Colorado have taken the initiative to identify eligible convictions and have offered to have prosecutors complete the paperwork to expunge convictions, those offices still generally at this point plan to rely on people with convictions to come forward and work with them or apply through an online process. See Mitchell Byars, *Boulder County DA Looking to Dismiss Thousands of Past Marijuana Possession Convictions*, DAILY CAMERA, Nov. 30, 2018, http://www.dailycamera.com/news/boulder/ci_32302890/boulder-county-da-looking-dismiss-thousands-past-marijuana [<https://perma.cc/DMV8-E7P2>] (noting also that the Boulder district attorney hopes eventually to complete the expungement process for eligible persons who do not contact his office).

¹⁴² See *supra* note 2 and accompanying text (discussing Governor's proposal).

¹⁴³ Press Release, Washington Governor Jay Inslee, Inslee Announces Initiative to Pardon Marijuana Misdemeanors (Jan. 4, 2018), <https://www.governor.wa.gov/news-media/inslee-announces-initiative-pardon-marijuana-misdemeanors> [<https://perma.cc/LD9H-825R>].

¹⁴⁴ *Id.*

¹⁴⁵ See Paul Armentano, *Washington: Governor Signs Marijuana Expungement Bill Into Law*, NORML BLOG (May 14, 2019), <https://blog.norml.org/2019/05/14/washington-governor-signs-marijuana-expungement-bill-into-law/> [<https://perma.cc/UZ4L-LEFM>].

Other states are considering similar measures. Michigan governor Gretchen Whitmer has said that she will consider expunging misdemeanor marijuana convictions following the state's adoption of a ballot measure to legalize recreational marijuana.¹⁴⁶ The expungement movement also extends to city jurisdictions that have prosecuted marijuana offenses under municipal law (convictions that would not be relieved by state expungement efforts). Individual cities announced such expungement processes in 2018, including San Francisco, San Diego, Seattle, and Denver.¹⁴⁷ These proposals and programs vary in terms of their criteria, but they generally are limited to misdemeanor convictions, convictions that occurred within a particular time period, and people without other criminal histories.¹⁴⁸ Even some jurisdictions that have not fully legalized marijuana have considered or passed legislation to permit clearance of certain misdemeanor possession convictions.¹⁴⁹ Not every jurisdiction that has legalized recreational

¹⁴⁶ See Jonathan Oosting, *Whitmer Will Consider Forgiving Marijuana Crimes*, DETROIT NEWS, Nov. 7, 2018, <https://www.detroitnews.com/story/news/local/michigan/2018/11/07/gretchen-whitmer-considers-forgiving-marijuana-crimes-michigan/1919044002/> [https://perma.cc/E2AR-WHN9].

¹⁴⁷ In 2018, San Francisco District Attorney George Gascon announced that his office would automatically expunge about 3,000 misdemeanor convictions and consider whether an additional 4,900 felony convictions should be downgraded to misdemeanors; San Diego identified about 4,700 cases that its District Attorney's office planned to expunge or downgrade. Timothy Williams & Thomas Fuller, *San Francisco Will Clear Thousands of Marijuana Convictions*, N.Y. TIMES, Jan. 31, 2018, <https://www.nytimes.com/2018/01/31/us/california-marijuana-san-francisco.html> [https://perma.cc/7UN4-A49W]. Seattle followed suit about a week later. See Johnson, *supra* note 130. Denver also announced at the end of 2018 that it would proactively work to expunge about 10,000 records of low-level misdemeanor marijuana offenses. See Kenney, *supra* note 130. On January 9, 2019, the Mayor rolled out his "Turn Over a New Leaf" program, which will offer both online access to expungement applications and live clinics for persons who wish to seek expungement; at these clinics, applicants will meet with representatives from the district attorney's office who will evaluate the eligibility of individuals for expungement and will complete the necessary paperwork if they find a conviction to be eligible. The program also will provide immigration attorneys to advise individuals about the possibility that an expungement application might bring an individual to the attention of immigration authorities. Bobbi Sheldon, *You Can Apply to Expunge Marijuana Convictions under New Denver Program*, 9NEWS (Jan. 9, 2019), <https://www.9news.com/article/news/local/you-can-apply-to-have-marijuana-convictions-expunged-under-new-denver-program/73-613378e0-0a68-4e64-a2a3-dda0bb04b297> [https://perma.cc/F8R7-SZRM].

¹⁴⁸ Governor Inslee's proposal, for example, is limited to individuals who have a single misdemeanor marijuana conviction on their adult record since 1998. GOVERNOR'S MARIJUANA JUSTICE INITIATIVE, July 4, 2019, <https://www.governor.wa.gov/marijuanajustice> [https://perma.cc/ER9W-UPWN].

¹⁴⁹ Maryland did not legalize marijuana in the manner discussed in this Article; it decriminalized low-level marijuana possession by converting it from a criminal offense into a

marijuana has decided to address past convictions—in fact, Nevada’s governor vetoed legislation that would have vacated low-level possession convictions.¹⁵⁰ Still, there is clearly an openness to reducing the effects of past marijuana convictions, and a number of jurisdictions have considered or passed legislation and executive orders to begin the process of clearing convictions. Some jurisdictions now offer specific expungement or pardon processes for low-level marijuana convictions even though the jurisdictions have not formally legalized recreational marijuana.¹⁵¹ There is not, however, a great deal of theory on why or when we should remove past marijuana convictions.

fine-only civil infraction. In 2016, Maryland passed legislation that made many more offenses eligible for expungement than had enjoyed eligibility under prior law; certain marijuana possession offenses that preceded decriminalization now are eligible for expungement. New Hampshire also has not legalized recreational marijuana as of this writing, but New Hampshire HB 1477 would have established an annulment procedure for arrests and convictions of marijuana offenses involving less than three-fourths of an ounce of the drug. The measure provided that a person could petition the court with a qualifying arrest or conviction and provide notice to the prosecutor; the prosecutor would then have ten days if he or she wished in which to request a hearing, but, otherwise, the court would grant the annulment request. If the prosecutor were to request a hearing, the prosecutor would have the burden of persuading the court that the underlying offense actually involved more than three-fourths of an ounce of marijuana; otherwise, the court would grant the annulment petition. *See* Douglass Dowty, *100s of Pot Convictions to be Tossed Under DA Plan: ‘A Simple Matter of Justice’*, SYRACUSE.COM (Jan. 25, 2019) <https://www.syracuse.com/news/2019/01/100s-of-pot-convictions-tossed-under-das-plan-a-simple-matter-of-justice.html> [<https://perma.cc/NVK9-CGCC>] (describing Syracuse District Attorney’s plan to offer expungement for marijuana convictions in anticipation of, but prior to, state legalization of recreational marijuana).

¹⁵⁰ Governor Brian Sandoval in 2017 vetoed legislation that would have required judges to seal records and vacate judgments where a person had been convicted of a marijuana offense where Nevada law now permits the conduct. *See* H.R. 259, 2017 Nev. Leg. 79th Sess. (Nev. 2017). In his veto statement, Governor Sandoval noted that individuals with criminal records could on a case-by-case basis apply for relief under existing state sealing and expungement processes. Chris Kudialis, *Sandoval Signs 3 Marijuana Bills into Law, Vetoes One*, LAS VEGAS SUN, June 13, 2017, <https://lasvegassun.com/news/2017/jun/13/sandoval-signs-3-marijuana-bills-into-law-vetoes-o/> [<https://perma.cc/W37D-6563>]. Washington’s legislature also considered but has failed to pass marijuana convictions expungement bills; Governor Inslee’s offer of pardons to low-level marijuana offenders cam on the heels of multiple attempts for the state legislation to pass a bill requiring judges to vacate convictions for possession of less than 40 grams of marijuana. *See* Quinton, *supra* note 133.

¹⁵¹ *See, e.g.,* Azi Paybarah, *About 160,000 People in New York to See Their Marijuana Convictions Disappear*, N.Y. TIMES, Aug. 29, 2019, <https://www.nytimes.com/2019/08/28/nregion/marijuana-records-new-york-city.html> [<https://perma.cc/7JA7-G27W>].

C. PRIOR EPISODES OF DECRIMINALIZATION AND LEGALIZATION

The legalization of marijuana use and trade is not the first time that the United States has decriminalized or legalized behavior that had previously been subject to sanction.¹⁵² Surprisingly, however, there has not been a great deal of systemic mitigation of criminal convictions where past behavior is no longer subject to criminal sanction, nor discussion of how to do so.¹⁵³ There may be a number of reasons for this. One, that one-way ratchet described above has meant that in general, criminal law is always expanding, rather than contracting.¹⁵⁴ The common wisdom has been that politicians do not get elected through leniency on crime,¹⁵⁵ so there simply has not been much formal decriminalization, and therefore little need to determine what to do with past convictions. Even when decriminalization has taken place, the pressure to appear tough on lawbreakers may make formal expungement or pardons politically unappealing. A second reason may be that much decriminalization occurs piecemeal and through constitutional litigation, rather than through any form of democratic legislation or popular initiative, which means that legislators have not been the prime movers on decriminalization and perhaps have not had much incentive to treat past convictions systemically. For example, the general decriminalization of interracial romantic relationships was the product of Supreme Court decision-making, rather than legislative deliberation.¹⁵⁶ Similarly, the

¹⁵² See *infra* notes 156–157 and accompanying text (discussing experience of decriminalizing interracial marriage, same-sex sexual activity, and alcohol possession and sale).

¹⁵³ See *infra* notes 165–166 and accompanying text (discussing lack of evidence of systematic pardons in the aftermath of Prohibition).

¹⁵⁴ See *supra* note 9 and works cited therein.

¹⁵⁵ While there may or may not be any empirical support for the proposition that being tough on crime was ever necessary for electability, the Willie Horton/Michael Dukakis campaign advertisement in 1988 persuaded many people that appearing lenient would be a liability. See, e.g., Morgan Whitaker, *The Legacy of the Willie Horton Ad Lives On, 25 Years Later*, MSNBC (Oct. 21, 2013, 10:30 PM), <http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives> [<https://perma.cc/SG7R-YRK8>]. This perceived need to appear tough on crime drove major changes in controlled substance sentencing. See, e.g., Arit John, *Timeline of the Rise and Fall of “Tough on Crime” Drug Sentencing*, THE ATLANTIC, Apr. 22, 2014, <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/> [<https://perma.cc/AJ8X-J9VJ>].

¹⁵⁶ See *Loving v. Virginia*, 388 U.S. 1 (1967).

decriminalization of consensual same-sex sexual activity was effectuated by a Supreme Court decision.¹⁵⁷

Finally, and perhaps most saliently, criminal convictions did not have as much effect in the past—prior to the era of mass incarceration, substantially fewer people had criminal convictions at all.¹⁵⁸ And, the ability to obtain knowledge about another person’s criminal convictions—whether that person was a potential employee, tenant, or friend—was much more limited.¹⁵⁹ Landlords and employers were less likely to perform criminal history checks.¹⁶⁰ The Internet provides individuals who might once have had to scrutinize local newspaper announcements or take enough interest to research in person at a court clerk’s office with the ability to quickly, easily, and at little to no cost discover a wealth of information about a person, including records for arrest and criminal conviction.¹⁶¹ The ease of obtaining this information, combined with increasingly strict identification requirements, has made the existence of criminal convictions easier for any interested party to obtain and use against that person.¹⁶²

Still, the issue of what to do with past convictions for behavior that no longer is criminalized has some precedent; both states and the federal government prosecuted and convicted people during the Eighteenth

¹⁵⁷ See *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)). In the United Kingdom, similar acts were decriminalized in 1967. In 2016, the United Kingdom formally pardoned persons who had been convicted under defunct sodomy statutes—an estimated 65,000 men were so convicted, and approximately 15,000 were still alive at the time of pardon. Michael Holden, *UK to Pardon Thousands of Gay Men Convicted Under Defunct Laws*, REUTERS (Oct. 20, 2016), <https://www.reuters.com/article/us-s-britain-gays-pardon/uk-to-pardon-thousands-of-gay-men-convicted-under-defunct-laws-id-USKCN12K1BB> [<https://perma.cc/JFE2-PYFQ>].

¹⁵⁸ See Gary Fields & John M. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J., Aug. 18, 2014, <https://www.wsj.com/article/s/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> [<https://perma.cc/UM9A-J634>].

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² In fact, one difficulty with this Article’s proposal is that convictions and arrests—despite attempts at reform—are likely to persist, ghostlike, on the internet. Even if official public records no longer contain a conviction, private companies that aggregate such information may not delete the convictions, and prior caches of public records may still reflect arrests and convictions. There are a few possible responses here. Formally, jurisdictions could explore the possibility of legislation that would require private companies to delete arrest and conviction records under particular condition. Realistically, hopefully, if potential landlords, employers, friends, and other curious parties do not see a reflection of an official conviction, they will be less likely to apply the same consequences to an individual.

Amendment's Prohibition period, for example.¹⁶³ While there is some evidence that legislatures considered pardoning or otherwise limiting past convictions following the amendment's repeal, there is no record that any legislature or executive formally did so; it appears that persons with convictions for alcohol-related offenses served out sentences handed down prior to repeal and maintained records of conviction.¹⁶⁴ It is possible that such efforts faded in part because the stigma carried by violations of liquor laws was not serious.¹⁶⁵ Efforts also would have been somewhat diffuse, as some states maintained laws criminalizing alcohol-related activity even after repeal, and many persons connected to illicit liquor activity were convicted of non-liquor offenses in addition to, or instead of, direct alcohol offenses.¹⁶⁶

D. MARIJUANA PROSECUTIONS AND SYSTEMATIC INJUSTICE

The effort to legalize marijuana also has reflected awareness of the past injustice and unfairness of punishing persons for marijuana-related offenses. The early medical marijuana movement centered around the stories of unreasonable prosecutions against terminally-ill individuals.¹⁶⁷ Advocates

¹⁶³ For a discussion of prohibition-era prosecutions, see DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION*, 253–66 (2010).

¹⁶⁴ I combed through legislative records and could not find any statute that a legislature passed to expunge convictions, nor could I find any indication of mass pardons. The only indication that I could find that persons might have been pardoned was in a statement in a short online article indicating that some individual pardons may have occurred, but no mass or automatic pardons. See Vicki Denig, *Were Bootleggers Released When Prohibition Ended?*, VINEPAIR (Dec. 7, 2016), <https://vinepair.com/articles/violators-prohibition-serve-full-sentence-post-repeal/> [<https://perma.cc/8JFR-SVHZ>]; see also Email from Dr. Engs, Professor Applied Health Sci., Indiana Univ., to author (Nov. 5, 2018, 1:19 PM PST) (on file with author) (One of the sources quoted in that article and an academic researcher on this subject noted that she had “heard” that about a third of bootleggers had been individually pardoned, but was not sure if that statistic was accurate or where it originated.).

¹⁶⁵ Juries often were loath to convict under state versions of the federal Volstead Act, effectively nullifying the law because they did not think punishment was appropriate. See OKRENT, *supra* note 163, at 253.

¹⁶⁶ This will also be the case with many people convicted based on illegal activity associated with marijuana as well; some people will have been convicted only of marijuana offenses, while others also will have been convicted of other non-drug offenses, and still others will have pleaded guilty to a non-drug offense based on conduct associated with marijuana use or trade. See generally *supra* Part III.F (discussing scope of eligibility for relief and noting that offense of conviction often tells us more about policing and prosecutorial discretion than it does about underlying conduct).

¹⁶⁷ California's medical marijuana initiative was coordinated by activists who highlighted the unfairness of jailing persons who used marijuana in treatment associated with HIV/AIDS and other serious illnesses. See Zachary Zane, *The Medical Marijuana Movement Was at a Standstill Until AIDS Activists Stepped In*, OUT MAG., June 26, 2018, <https://www.out.com/n>

highlighted the inappropriateness of punishment against people who were sick, in pain, and able to better manage symptoms with marijuana use; they did not just argue that medical marijuana prosecutions were impractical, but immoral.¹⁶⁸ As advocacy began to focus on recreational marijuana, advocates have highlighted two arguments: one, as this Article outlined above, has been the economic benefits of legalized marijuana commerce.¹⁶⁹ But the other has been the injustice—and, particularly, the race and class-based injustice—of how marijuana offenses have been and continue to be prosecuted. Advocates note the exceptional impact that criminalizing marijuana has had on poor communities and minority communities¹⁷⁰ and make the case that part of the reason for creating a legal marijuana industry is not just so that states can raise tax revenues and entrepreneurs can create jobs and profits, but because enforcement of marijuana laws has been harmful.¹⁷¹ Marijuana reformers also have been persuasive in arguing that

ews-opinion/2018/6/26/medical-marijuana-movement-was-standstill-until-aids-activists-step-ped [https://perma.cc/G8M8-6XN5].

¹⁶⁸ See, e.g., Michael Pollan, *Living With Medical Marijuana*, N.Y. TIMES, July 20, 1997, <https://www.nytimes.com/1997/07/20/magazine/living-with-medical-marijuana.html> [https://perma.cc/P796-FKGN].

¹⁶⁹ See *supra* notes 111–117 and accompanying text.

¹⁷⁰ See, e.g., Stevie Johnson, *Here are Kristen Gillibrand's Stances on Marijuana, Russian Meddling, NRA and Health Care*, ROCHESTER DEM. & CHRON. NEWS, July 20, 2018, <https://www.democratandchronicle.com/story/news/2018/07/20/kirsten-gillibrand-town-hall-mcc-rochester-senator-marijuana-russian-meddling-nra-health-car/810776002/> [https://perma.cc/H8UU-52ZZ] (quoting Senator Kirsten Gillibrand: “I think the ways the laws are applied are so disproportionate toward people of color. If you’re African-American or Latino you are four times more likely to be arrested for marijuana possession. In New York City you’re 10 times as likely to be arrested for possession. I think that’s outrageous and an injustice.”); Tal Kopan, *Cannabis reform no laughing matter for Oakland Rep. Barbara Lee*, S.F. CHRON., Jan. 22, 2019, <https://www.sfchronicle.com/politics/article/Cannabis-reform-no-laughing-matter-for-Oakland-13552373.php> [https://perma.cc/7UM5-LXT4] (advocating for reforms because marijuana laws reflect “‘a systemic racism, and institutional racism and injustice in our criminal justice system’ . . . ‘When you look at who’s in prison, who’s in jail, whose lives have been shattered by marijuana charges—who is it? It’s black young people; it’s brown young people. And so we have to stop that.’”).

¹⁷¹ See, e.g., Matt Laslo, *Why Democrats Should Embrace Pot for the Midterms*, ROLLING STONE, Oct. 28, 2018, <https://www.rollingstone.com/politics/politics-features/democrats-wee-d-pot-midterm-elections-747138/> [https://perma.cc/DD4E-XCTB] (quoting New Jersey Representative Tom Malinowski: “‘There’s no good rationale for locking up a lot of young people up for marijuana,’ says Malinowski, a human rights activist. ‘And if that’s going to be our judgement going forward then we also need justice looking backward.’”); Carly Sitrin, *State Suspends Low-Level Marijuana Cases Until September—For a Start*, N.J. SPOTLIGHT, July 25, 2018, <https://www.njspotlight.com/stories/18/07/25/nj-suspends-low-level-marijuana-cases-until-september-for-a-start/> [https://perma.cc/EL3Y-6TXK] (quoting NJ Attorney General as stating “[a] single marijuana conviction can have devastating consequences,

recreational marijuana carries similar or perhaps lesser harms than other substances people use recreationally.¹⁷² People within communities that have been harmed by marijuana enforcement efforts are attuned to the disconnect between current commerce and past carceral treatment and express concern and resentment about the differences in legal regimes.¹⁷³

E. COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS.

Many people in jurisdictions that have legalized marijuana currently are incarcerated for marijuana offenses or are otherwise under community

including fines, incarceration, job loss, and effects on housing and immigration status, affecting not just the individual, but also their families and communities”); Brooke Staggs, *People with Marijuana on their Record Can Clear it Up; Most Haven’t*, ORANGE CTY. REG., Mar. 23, 2018, ocregister.com/2018/03/23/people-with-marijuana-on-their-record-can-clear-it-up-most-havent/ [https://perma.cc/5NVB-XD3G] (“‘A criminal conviction can be a barrier to employment, housing and other benefits,’ [San Francisco District Attorney George] Gascón said. ‘So instead of waiting for the community to take action, we’re taking action for the community.’”).

¹⁷² Marijuana advocates generally extoll the benefits of marijuana use—aided in part by the fact that the majority of states now permit its use for medical purposes—and compare the detrimental effects of use favorably with alcohol. Advocates argue that alcohol use tends to occur in public, carrying possibilities for violence, driving under the influence, and other acts of dangerous decision making, while marijuana use tends to occur at home, where people are less likely to pose a social danger. There are arguments that marijuana does pose additional dangers. One of the primarily arguments against legalization has been the possibility of an increase in persons driving under the influence of marijuana; the argument has been that (1) more individuals will use marijuana when it is legal than not, increasing the number of potential drivers using marijuana; (2) it will be more difficult to determine whether or not someone is under the influence of marijuana while driving than it would be with alcohol, because of the different ways in which bodies metabolize marijuana, and because standard roadside sobriety tests are less able to detect stoned drivers; and (3) people may not realize they are too intoxicated to drive, or might not realize that driving under the influence of marijuana is in fact illegal, or might erroneously believe they are better drivers while under the influence. See Maggie Koerth-Baker, *Driving under the Influence, of Marijuana*, N.Y. TIMES, Feb. 27, 2014, https://www.nytimes.com/2014/02/18/health/driving-under-the-influence-of-marijuana.html [https://perma.cc/M9V3-PNJ9]. Although these concerns are salient, researchers have suggested that marijuana is likely less of a driving risk factor than alcohol. *Id.*

¹⁷³ In a local Seattle conflict over the location of a pot shop next to a black church, one church member said, “It’s very emotional for me to see this pot shop open here. Many of us were born and raised here and know people who went to jail for selling pot. To see the legal sales being protected here just feels hypocritical.” Alexa Vaughn, *Church Members Protest Seattle Pot Shop as Too Close for Comfort*, SEATTLE TIMES, Oct. 6, 2014, https://www.seattletimes.com/seattle-news/church-members-protest-seattle-pot-shop-as-too-close-for-comfort/ [https://perma.cc/SSG6-TKRP].

supervision and control, which directly affects them and their families.¹⁷⁴ This Article advocates that those convictions should be cleared and all convicted persons should be released from the terms of sentence for the marijuana conviction. Many of the other direct effects of criminal conviction, however, go beyond those explicitly provided for in a criminal sentence. A person convicted of a crime does not escape the consequences of that conviction just because time passes or the behavior is decriminalized. And people convicted of marijuana offenses remain incarcerated in jurisdictions that have legalized marijuana possession and sale; this is especially so for individuals convicted of offenses higher than possession.¹⁷⁵ Others remain on probation, parole, or community supervision for those offenses.¹⁷⁶ Still others are in the process of resolving legal and financial obligations attendant to conviction—fines and court fees that are particularly burdensome for the vast majority of criminal defendants who are indigent.¹⁷⁷

Collateral consequences—which may as a practical matter restrict a person more than the direct criminal law sentence—also flow from conviction.¹⁷⁸ People who are no longer dealing with direct sentencing consequences for criminal convictions still grapple with formal civil legal

¹⁷⁴ About half of American adults have or have had an incarcerated immediate family member. Percentages are higher for racial minorities—while about 42% of white Americans have had this experience, that figure rises to 48% of Latinx Americans and 62% of black Americans and Native Americans. These figures also vary by income—half of Americans making under \$25,000 per year have had an immediate family member incarcerated, while that figure is one-third for people making over \$100,000. See Rachel Weiner, *Almost Half of U.S. Adults Have Seen a Family Member Jailed, Study Shows*, WASH. POST, Dec. 6, 2018, https://www.washingtonpost.com/crime-law/2018/12/06/almost-half-us-adults-have-seen-family-member-jailed-study-shows/?utm_term=.1182b84b06c8 [<https://perma.cc/KS4M-FTPK>] (reporting results of Cornell University study).

¹⁷⁵ Jurisdictions may permit conviction for drug offenses higher than possession in cases where an individual is found in possession of quantity of drug that is larger than a statutory presumption of intent to sell/traffic; appears to be packaged for sale or distribution; or is located in conjunction with tools, paperwork, or other items supporting an inference of intent to sell/traffic. See, e.g., *McRae v. United States*, 148 A.3d 269, 273 (D.C. 2016) (noting that an intent to distribute marijuana may be inferred from quantity, paraphernalia, and packaging).

¹⁷⁶ See Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html> [<https://perma.cc/MNL7-8C4K>] (reporting that approximately 4.5 million Americans were on probation or parole or otherwise under community supervision).

¹⁷⁷ Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtor's Prison*, 65 UCLA L. REV. 2, 7–8 (2018) (referring to fees and fines imposed on indigent defendants as a “poverty penalty”).

¹⁷⁸ At least one scholar has argued that collateral consequences are sufficiently burdensome that jurisdictions should consider them as harms when determining whether or not it is wrongful to criminalize behavior in the first place. Zachary Hoskins, *Criminalization and the Collateral Consequences of Conviction*, 12 CRIM. L. & PHIL. 625, 635–37 (2017).

restrictions that forbid them from fully engaging with their communities. Persons convicted of felony offenses are in many jurisdictions temporarily or permanently disenfranchised from voting, preventing them from engaging in the basic democratic process of shaping the laws that govern them.¹⁷⁹ Drug convictions bar people from access to income assistance,¹⁸⁰ federal housing¹⁸¹ and federal financial aid,¹⁸² preventing them from being able to access welfare support, affordable places to live, or support for educational and career advancement. Convictions prevent people from serving on juries,¹⁸³ hindering them from being a part of the body that determines whether another person will also be subject to criminal sanction. The inability to participate is itself a limitation, and it also stigmatizes the individual as someone who cannot participate appropriately in public processes. People may experience issues with family formation through fostering or adoption.¹⁸⁴ Persons with criminal convictions also are subject to deportation,¹⁸⁵ which has been an increasingly salient consequence for criminal conviction in recent years.¹⁸⁶

Outside of formal criminal and civil legal constraints, persons with conviction records also face professional, social, and personal barriers to

¹⁷⁹ See BRENNAN CTR. FOR JUSTICE, CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES (2019), https://www.brennancenter.org/sites/default/files/legal-work/2018.1.2.07_Criminal_Disenfranchisement_Map.pdf [<https://perma.cc/9SCQ-LY9Q>] (cataloging such laws).

¹⁸⁰ See 21 U.S.C. § 862a(a) (2014).

¹⁸¹ See 24 C.F.R. § 982.553(a)(ii)(C) (2016); see also Marah A. Curtis et al., *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE: J. OF POL'Y DEV. & RES. 37, 43–44 (2013), <https://www.huduser.gov/portal/periodicals/cityscpe/vol15num3/ch2.pdf> [<https://perma.cc/2K7F-LGYE>].

¹⁸² See 20 U.S.C. § 1091(r) (2019); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-691, NONVIOLENT DRUG CONVICTIONS: STAKEHOLDERS' VIEWS ON POTENTIAL ACTIONS TO ADDRESS COLLATERAL CONSEQUENCES 11 (2017), <https://www.gao.gov/assets/690/688187.pdf> [<https://perma.cc/9BD2-2PZX>].

¹⁸³ See 28 U.S.C. § 1865(b)(5) (2000); NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.csjusticecenter.org/database/results/> [<https://perma.cc/V9AM-W346>] (select keyword filter “jury service”).

¹⁸⁴ See Adoption and Safe Families Act of 1997, 111 STAT. 2115 (1997).

¹⁸⁵ See 8 U.S.C.A. § 1226(a)(2)(B) (setting out deportation as consequence of drug convictions for non-citizens, but including a marijuana-specific exception for “a single offense involving possession for one’s own use of 30 grams or less of marijuana”). For a detailed look at marijuana’s immigration consequences, see generally W. Scott Railton, *Marijuana and Immigration*, 32 CRIM. JUST. 14 (2017) [<https://perma.cc/LV7M-WLXK>].

¹⁸⁶ Criminal convictions may render a person eligible for deportation. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court acknowledged the impact of deportation as a consequence of a guilty plea and held that a person could demonstrate ineffective assistance of counsel under the Sixth Amendment where an attorney offered faulty advice to a person whose guilty plea rendered him automatically eligible for deportation.

community integration. People experiencing custody disputes have more difficulty retaining custody when judges take criminal convictions into account in evaluating the best interests of the child.¹⁸⁷ Criminal histories affect employment.¹⁸⁸ Employers often ask for criminal history and refuse to hire on the basis of prior convictions; recognition of the serious effects criminal convictions have on the ability of persons to obtain employment has led some jurisdictions to adopt “ban the box” legislation that prohibits employers from asking about criminal histories on initial job applications.¹⁸⁹ Landlords also routinely perform background checks on potential tenants and refuse to rent to persons convicted of crimes.¹⁹⁰ Schools perform criminal background checks on parent volunteers and may deny parents with criminal histories the ability to chaperone field trips or assist teachers in class.¹⁹¹

¹⁸⁷ *E.g.*, ARIZ. REV. STAT. § 25-403.04 (2013) (“If the court determines that a parent has abused drugs or alcohol or has been convicted of any drug offense . . . within twelve months before the petition . . . is filed, there is a rebuttable presumption that sole or joint legal decision-making by that parent is not in the child’s best interests.”); *accord* GA. CODE ANN. § 19-9-3 (2017) (“In determining the best interests of the child, the judge may consider . . . criminal history of either parent; and . . . substance abuse by either parent.”); *see also* Jesse Krohn & Jaime Gullen, *Mothers in the Margins: Addressing the Consequences of Criminal Records for Young Mothers of Color*, 46 U. BALT. L. REV. 237, 259–61 (2017); Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J. L. & SOC. POL’Y 24 (2013).

¹⁸⁸ *See* JEREMY TRAVIS ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 258 (2014).

¹⁸⁹ The California legislature, for example, adopted such a provision in 2018, prohibiting employers from asking about criminal history during either the initial application or interview process; employers may only request criminal history after making a conditional offer of employment. The law also prohibits employers from considering arrests that did not lead to charges; successfully completed pretrial diversion programs; and convictions that have been sealed, dismissed, or expunged. *See* CAL. GOV’T § 12952 (2019). Other states and localities have adopted similar measures. *See* Matt Boyer, *Tiptoeing the Minefield: Avoiding the Pitfalls of Background Checks, Negligent Hiring, and ‘Ban the Box’ Legislation*, IN-HOUSE DEF. Q. 6, 10 (2015) (listing a number of states and localities that have adopted various forms of “ban the box” laws).

¹⁹⁰ *See* Merf Ehman & Anna Reosti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 1, 16–22 (2015); *see also* OFFICE OF GENERAL COUNSEL, U.S. DEPT. HOUS. & URBAN DEV., *GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS* (2016), https://www.hud.gov/sites/documents/hud_ogcguidappfhastander.pdf [<https://perma.cc/N4TP-QNZE>].

¹⁹¹ It is unclear how widespread criminal background checks are for parent volunteers, but they are not isolated. Several years ago, after a parent supervising a field trip for an elementary school in Seattle noticed that another supervising parent was a person she recognized as having an outstanding criminal warrant, the Seattle Public Schools began enforcing a requirement that parent volunteers submit to a criminal background check. *See* Donald Vassar, *Parent*

Professional licensing organizations also frequently exclude persons with criminal convictions—such organizations control entry to fields ranging from law to home health care.¹⁹² Perhaps most ironically for the purposes of this Article, while the legal marijuana business thrives and marijuana entrepreneurs make comfortable profits, people who engaged in marijuana trade prior to legalization are barred in many jurisdictions from becoming licensed to be involved in this expanding economic sector.¹⁹³ The people who built the market and served the customer for years, in other words, now cannot use that professional expertise or take advantage of the new legal drug economy.

Less formally, persons with criminal convictions are stigmatized socially.¹⁹⁴ The designation of a person as “a criminal” is one that sets the person aside within his or her community; in turn, many people in the community take this designation to mean that those convicted of crimes are to be shunned or avoided because of the harm they have caused to society.¹⁹⁵ The stigma of felony conviction is particularly notable; media sources and laypeople alike often refer to people convicted of felony offenses by the title “felons.”¹⁹⁶ Demarcation as “a criminal” is a demarcation as “other,” and a

Spots Fugitive on Field Trip, SEATTLE PI, Dec. 15, 2011, <https://www.seattlepi.com/local/kom/article/Parent-spots-fugitive-on-school-field-trip-2403717.php> [<https://perma.cc/4YAT-E2M2>]; see also Kirk Johnson, *Oregon's Legal Sale of Marijuana Comes with Reprieve*, N.Y. TIMES, Sept. 20, 2015, <https://www.nytimes.com/2015/09/21/us/oregons-legal-sale-of-marijuana-comes-with-reprieve.html> [<https://perma.cc/R7SZ-FZ49>] (profiling a woman who was required to disclose her fifteen-year-old misdemeanor marijuana conviction on school volunteer applications).

¹⁹² See generally MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, UNLICENSED AND UNTAPPED: REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS, NAT'L EMP. L. PROJECT (2016), <https://s27147.pcdn.co/wp-content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf> [<https://perma.cc/69G4-LKCY>].

¹⁹³ A few jurisdictions have recognized that such requirements exclude people who might become gainfully employed in the marijuana industry, and that those people are excluded based more on bad luck and demographics than on behavior that historically differed from people who can get licenses everywhere; Oakland, for example, has specifically reached out to such individuals. See Max Blau, *Legal Pot is Notoriously White. Oakland Is Changing That.*, POLITICO (March 27, 2018), <https://www.politico.com/magazine/story/2018/03/27/oakland-legal-cannabis-hood-incubator-217657> [<https://perma.cc/3FYX-DEQ2>].

¹⁹⁴ See, e.g., Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

¹⁹⁵ See, e.g., Ahrens, *supra* note 23, at 738–39 (discussing the “othering process” that motivates most modern criminal sanctioning regimes).

¹⁹⁶ Certainly, all criminal convictions carry the possibility of social stigma, and misdemeanor drug offenses perhaps particularly stigmatize because of stereotypes about persons associated with substance use. That said, “misdemeanant” is not a proper noun generally found in newspaper headlines or common vernacular.

person identified as a convicted criminal in his or her community may always find it difficult to fully participate.¹⁹⁷

F. THE SCOPE OF ELIGIBILITY

Pardoning low-level, one-time convictions is necessary but insufficient to make amends for past harms. The legal marijuana industry is burgeoning, lucrative, and overwhelmingly run by individuals who have not been touched by criminal justice.¹⁹⁸ The communities that were harmed by marijuana law enforcement during the War on Drugs continue to suffer economic and educational setbacks because of past engagement with marijuana.¹⁹⁹ They generally are not experiencing gains based on present marijuana commerce.²⁰⁰ A person with a single marijuana possession conviction is extremely sympathetic, making the argument for pardon or expungement relatively easy—the person’s offense is minor, and it represents a (usually) youthful one-off mistake. The people who are likely to be experiencing the most significant lingering effects of past criminal law are those who have multiple convictions and/or felony convictions.²⁰¹ A potential employer may be willing to take a chance on an individual with a lone decades-old marijuana conviction that is not expunged; a person with several convictions, or a felony conviction, is less likely to experience such grace.

There is not necessarily a meaningful, salient difference between the person who engaged in routine recreational marijuana use during the age of prohibition without getting caught and the person who at some point came to the attention of police and amassed more than one misdemeanor conviction, particularly in light of documented racial differences in enforcement.²⁰²

¹⁹⁷ This demarcation is not without social value, particularly if the criminal conviction is for an offense society continues to identify as dangerous. *See, e.g.*, Boyer, *supra* note 189, at 6 (arguing that employers use criminal background checks to avoid hiring employees that may cause harm and carry liability). This argument makes sense where we continue to judge a person’s past conduct to be the sort that would create danger; where we have determined the behavior to be socially acceptable, that argument is unpersuasive.

¹⁹⁸ *See supra* notes 111–117 and accompanying text (discussing burgeoning legal marijuana industry).

¹⁹⁹ *See supra* Part II.

²⁰⁰ *See supra* Part II.

²⁰¹ It is difficult to pin down what percentage of persons with marijuana convictions have been convicted of low-level possession versus either felony possession or felony sales, trafficking, and cultivation offenses. The overwhelming majority of arrests are for possession offenses, but, as such arrests may be more likely to result in dismissal, adjournment in contemplation of dismissal, pretrial intervention, or other non-conviction dispositions than higher-level offenses (and as about 25% of all charges end in dismissal), projecting from arrest statistics likely would not be helpful.

²⁰² *See* DRUG POLICY ALLIANCE, *supra* note 64 and works cited therein.

While there is an argument to be made that a person who continues to engage in criminal infractions after the intervention of criminal law is more morally culpable than a person who has not enjoyed the supposed benefits of such interaction—rehabilitative efforts, for example, that are designed to address issues that may cause criminal behavior—there are several reasons why that narrative is not persuasive. First, given the widespread use of recreational marijuana and the much narrower, unrepresentative group of individuals convicted of marijuana offenses,²⁰³ marijuana convictions likely reflect decisions about where and how to police (as well as whether or not to effect an arrest or citation when someone is discovered engaging in criminal activity) rather than underlying rates of criminal behavior. Even individuals who are ultimately cited or arrested by police may be more likely to be able to participate in pretrial diversion programs if they have social or economic status.²⁰⁴ Second, once an individual has a criminal conviction, it may be more likely that police surveil or arrest (and that prosecutors pursue charges) because the prior conviction exists.²⁰⁵ In other words, people are more likely to be surveilled, detected, and arrested in some communities than others; they are likely to remain in those communities; and, once they have an offense, they may be less likely to enjoy leniency.

For these reasons, persons convicted of felony marijuana offenses should also enjoy the benefit of having convictions expunged. Some jurisdictions, such as California, are permitting certain felony convictions to be reclassified (and resentenced, where applicable) as misdemeanor offenses, which is preferable to leaving felony convictions untouched.²⁰⁶ Felony convictions are, however, undergirded by the same problematic discretionary decisions as possession offenses. The decision whether to proceed against an individual on felony or misdemeanor charges is discretionary, meaning that similarly situated individuals ultimately plead to or are otherwise

²⁰³ See *supra* notes 64–65 and works cited therein.

²⁰⁴ See Shaila Dawan & Andrew W. Lehren, *No Money, No Mercy: After a Crime, the Price of a Second Chance*, N.Y. TIMES, Dec. 12, 2016, <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [<https://perma.cc/7YD2-GFJ8>] (detailing substantial cost of participating in pretrial diversion programs and disproportionate impact this has on ability of individuals of different incomes to take advantage of such programs).

²⁰⁵ For a discussion of the various schemas, assumptions, and biases that shape police decisions about whom to investigate, approach, and detain, see Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–87 (1999).

²⁰⁶ While California permits automatic expungement for misdemeanor offenses, felony reclassification is generally treated as more of a discretionary act. See CAL. HEALTH & SAFETY CODE § 11361.9 (2018).

convicted of different offenses, and that those plea decisions may be made along lines other than relative culpability.²⁰⁷

Marijuana convictions reflect racist governmental decision-making at a variety of junctures, and expunging past convictions produced by racist decision-making is an appropriate (if not fully adequate) act of restoration for the communities that have been most affected. The laws that first criminalized and then increased criminal penalties for marijuana activity largely reflected racism, first against Mexican immigrants and then against black communities.²⁰⁸ Laws criminalizing marijuana likely would not have existed in the first place absent racial animus.²⁰⁹ That animus has been even more striking, however, in enforcement of marijuana laws. While marijuana use historically has tended to be fairly constant cross-racially, the majority of persons convicted under laws criminalizing marijuana have been black or Latinx.²¹⁰ Those convictions have had the effect of removing people from their families and communities during incarceration, as well as subjecting persons under probation or community supervision to surveillance and supervision costs (affecting the families of supervised persons as well).²¹¹ While part of the reason offered for expunging only misdemeanor convictions is that the underlying conduct now is legal, that is true of felony marijuana convictions as well. A person still cannot possess more than a particular amount of marijuana for personal use, for example, but the assumption undergirding higher penalties for greater quantities always was that the higher quantities reflected a criminal intent to distribute the

²⁰⁷ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 (2004) (arguing that plea bargaining produces substantial inequalities along lines of “wealth, sex, age, education, intelligence, and confidence”).

²⁰⁸ See *supra* Part I.A.

²⁰⁹ See *supra* Part I.A.

²¹⁰ See *supra* note 64.

²¹¹ See generally Donald Brama, *Families and Incarceration*, in MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 118 (2002).

product.²¹² Now, a person in that position would, in theory, be able to open a retail establishment and enjoy community respect.²¹³

Marijuana legalization has a great deal of public support, and this support is driven in part by images of persons convicted of mere pot possession.²¹⁴ The War on Drugs exacted a tremendous carceral toll, and perhaps 20% of incarcerations over the past few decades can be attributed to drug convictions,²¹⁵ meaning that a huge number of people are serving and have served time directly for drug offenses. The reality, however, is that the people who are eligible for expungements under the existing programs proposed or adopted in most jurisdictions—people who have been convicted only of low-level simple possession of marijuana offenses—do not comprise a significant percentage of incarcerated persons.²¹⁶ In particular, it would be unusual for a person convicted solely of a single low-level marijuana

²¹² Federal law and the law of most states allows for individuals to be charged with “possession with intent to distribute” or some other similarly titled serious offense based merely on the quantity of drugs in their possession. *See, e.g.,* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. LEG. 1, 23–24 (1989) (“[M]ost statutes penalizing possession of narcotics with intent to distribute erect a legal presumption that the added mental element exists if the defendant was holding a certain controlled substance or more than a specified quantity of the controlled substance.”).

²¹³ This Article has acknowledged that there are legal and monetary barriers to market entry in the marijuana industry. *See supra* notes 119–122. This Article also does not suggest that every marijuana outlet or pot shop is met with a warm community embrace. Marijuana retail businesses are subject to zoning that reflects that such stores may not be appropriate in all communities. Washington State’s marijuana zoning restrictions restricts, for example, prohibit pot shops from locating within 1,000 feet of schools, playgrounds, parks, transit centers, libraries, child care centers, or arcades that permit minors to enter. Some communities have fought the location even of apparently properly-zoned businesses. *See, e.g.,* Vaughn, *supra* note 173 (members of a church located adjacent to Seattle’s second pot shop has staged multiple protests against the location of the shop; ultimately, the church brought a lawsuit to challenge the zoning).

²¹⁴ *See* Koerth-Baker, *supra* note 172 (discussing degree to which reformers focused on marijuana’s lack of harm and lack of rationale for criminalizing users).

²¹⁵ John Pfaff, who has achieved a level of popular recognition for his statistical study of incarceration rates, argues that any narrative that suggests that the War on Drugs has been a primary source for mass incarceration (what he refers to as “The Standard Story”) or that reining in that drug war will dramatically reduce mass incarceration lacks support in statistics. According to his figures, only about 21% of state incarceration growth between 1980 and 2009 was caused by drug convictions. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 32 (2017).

²¹⁶ *Cf.* U.S. SENTENCING COMM’N, 2017 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table33.pdf> [<https://perma.cc/9JCN-WBLF>] (showing that in 2017, only ninety-two people were convicted in federal court for simple possession of marijuana).

possession charge to be sentenced to a term of incarceration at all.²¹⁷ To the extent that marijuana legalization is meant to address the past harms of mass incarceration, the people carrying misdemeanor convictions are only a small slice of people who are worthy of reconsideration—and not the most important slice. Any effort to both reduce mass incarceration and make amends for past harms inflicted by overuse of criminal law will need to involve a much broader group of people than those convicted for minor drug possession.

While a person released from confinement or correctional supervision is in the same position as a never-supervised person with respect to the conviction itself, they retain that additional experience of formal state control; the incarcerative experience itself damages and severs family relationships, employment and housing arrangements, financial well-being, and community standing.²¹⁸ Their immediate families have also lost the benefit of income, child care, and relationships.²¹⁹ Addressing and reconciling those harms should be an essential element of meaningful criminal justice reform.

Due to the economic effects of the War on Drugs on minority communities, we should work to reduce the impact of past conviction decisions on future economic opportunities. As this Article has noted, marijuana convictions can bar individuals from reaping the benefits of the legal marijuana industry, but more broadly, the War on Drugs was particularly damaging to black communities who missed out on the economic growth contemporaneous with the growth of mass incarceration, particularly in the 1990s.²²⁰ The economic harms are not limited to individual convicted or incarcerated persons—employers avoid hiring persons from neighborhoods perceived as high crime,²²¹ and the communities themselves

²¹⁷ In some jurisdictions that have legalized marijuana, low-level marijuana possession already had been largely decriminalized by being transformed into a fine-only offense, meaning that any convictions within the past decade or so would not have been eligible at all for an incarcerative sentence. Even in jurisdictions where simple possession of marijuana continued to carry a possible jail or prison term, a first-time low-level marijuana offense rarely would lead to any sentence of incarceration. For a general discussion of the extent to which the debate over mass incarceration has perhaps misleadingly suggested that nonviolent drug offenses have driven mass incarceration, and the fact that solutions to mass incarceration will require addressing other offenses, see PFAFF, *supra* note 215, at viii.

²¹⁸ See Hoskins, *supra* note 178, at 626.

²¹⁹ See Brama, *supra* note 211, at 118. Families also may incur direct costs associated with incarceration, like travel costs to visit incarcerated family members and high-priced collect phone calls. *Id.* at 120–21.

²²⁰ See Bruce Western et al., *Black Economic Progress in the Era of Mass Imprisonment*, in MAUER & CHESNEY-LIND, *supra* note 211, at 175–78.

²²¹ *Id.* at 177.

have lost the economic and commercial contributions of their residents. To redress the harms of criminalization and incarceration, states should take action to help members of the communities that have borne the brunt of the War on Drugs to be able to contribute economically and socially.

IV. THE MECHANICS OF RETROACTIVE LEGALITY

There are multiple mechanisms by which jurisdictions could curtail the effects of past convictions. This section of the Article will describe pardons and expungements, as well as the theoretical and practical advantages and barriers to using these methods. The Article concludes that the most promising route will be a combination of expungement and record-sealing (likely accompanied by legislation that would prohibit the use of expunged convictions for various purposes if unearthed). Any of these paths is preferable to the current practice of indefinitely maintaining easily accessible records of conviction. One of the primary determinants of the appropriate path may be the political will of the state: pardons generally represent executive discretion, while expungements may require (at least if statewide and systematic) more legislative coordination and agreement. One concern with both pardons and expungements is the extent to which even expunged or pardoned convictions may be available to some parties, but clearing and sealing past convictions will reduce the footprint of a conviction considerably.

A. MASS PARDONS

Governor Inslee's announcement has context: in the past, executives have used the commutation and pardon power broadly to convert sentences or relieve convictions.²²² Executives normally grant commutations and pardons²²³ to individual applicants who complete an involved and detailed

²²² For general discussion about the history and scope of the pardon power, see Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991) (arguing to move the process of granting clemency for retributive fairness away from unguided executive discretion).

²²³ Commutations and pardons are distinct acts of executive clemency. Commutations change the terms of a sentence but leave the underlying conviction in place; the commutation might shorten a sentence, change a death sentence to a life sentence, or otherwise relieve a convicted person of a sentencing condition. A pardon, in contrast, forgives the underlying conviction itself, and generally is designed to restore a person to all rights of citizenship. See Nora V. Demleitner, *Implementing Change in Sentencing and Corrections: The Need for Broad-Based Research*, 28 FED. SENT'G REP. 303, 303 (2016). A pardon may not, however, fully restore all civil rights—since state law governs the right to vote, for example, a state could still use a federally pardoned conviction to disenfranchise a potential voter. *Id.* at 304.

process,²²⁴ and those commutations and pardons are largely discretionary even once a person completes the process.²²⁵ Still, mass pardons of criminal behavior have some historical precedent. Governors have been willing, for example, to engage in some mass commutations in the death penalty context.²²⁶ There also is precedent for broadly clearing persons who were convicted for particular categories of crime. The United States did not decriminalize or legalize the practice of evading draft requirements, but on his second day in office, President Jimmy Carter issued a full pardon restoring all civil rights to persons convicted of nonviolent offenses under the Military Selective Service Act.²²⁷ As with death row commutations, the underlying criminal behavior had not been legalized—it remained a criminal offense to violate the Military Selective Service Act—but President Carter argued that pardons were a necessary step to healing the social divides created by the Vietnam War.²²⁸ The act of pardon, in other words, was an act of social restoration, both for the pardoned individuals and for the society issuing the pardon.

Use of the pardon process carries several advantages over alternative methods of expungement. First, executive pardon power is generally broad

²²⁴ The pardon process generally requires an applicant to compile records related to the conviction as well as to provide documentation of reform efforts, and often benefits from the guidance of an attorney.

²²⁵ See Kobil, *supra* note 222 (discussing and critiquing purely discretionary nature of most executive clemency or pardoning schemes).

²²⁶ In 2003, then-Governor George Ryan famously commuted to life the death sentences of all persons on death row in Illinois as one of his parting acts in office. Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, <https://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html> [<https://perma.cc/U8TG-LPA5>]. Several other governors similarly have commuted the death row in their states, all while exiting office. Ohio Governor Richard Celeste commuted death sentences for the state's eight death row residents in 1990. See *At End of Term, Ohio's Governor Commutes Death Sentences for 8*, N.Y. TIMES, Jan. 12, 1991, <https://www.nytimes.com/1991/01/12/us/at-end-of-term-ohio-s-governor-commutes-death-sentences-for-8.html> [<https://perma.cc/WC4H-AW6F>]. New Mexico Governor Toney Araya commuted the death sentences of his state's five death row occupants in 1986. See Robert Reinhold, *Outgoing Governor in New Mexico Bars the Execution of 5*, N.Y. TIMES, Nov. 27, 1986, <https://www.nytimes.com/1986/11/27/us/outgoing-governor-in-new-mexico-bars-the-execution-of-5.html> [<https://perma.cc/8JQL-WG2S>]. Arkansas Governor Winthrop Rockefeller commuted his state's fifteen-member death row in 1970. See *Arkansas Spares All on Death Row*, N.Y. TIMES, Dec. 30, 1970, <https://www.nytimes.com/1970/12/30/archives/arkansas-spares-all-on-death-row-outgoing-gov-rockefeller-commutes.html> [<https://perma.cc/F3RZ-KWTA>].

²²⁷ See Andrew Glass, *President Carter Pardons Draft Dodgers, January 21, 1977*, POLITICO (Jan. 21, 2018), <https://www.politico.com/story/2018/01/21/president-carter-pardon-s-draft-dodgers-jan-21-1977-346493> [<https://perma.cc/9PPJ-RXFP>].

²²⁸ *Id.*

and discretionary.²²⁹ Legislatures by necessity must deliberate over individual bills, pass them through committee, debate them, clear procedural rule hurdles, and, in the forty-nine states with bicameral legislatures, reconcile them across legislative chambers—all before seeking executive approval. Executives can move more swiftly than a legislature, and also may be able to proceed where, for various reasons, a legislature is unable or unwilling to pass legislation to clear past convictions. While many jurisdictions do have a pardon infrastructure in place to advise executives on whether or not to grant particular pardon applications, that infrastructure itself is generally a creation of executive will.²³⁰

However, there are several drawbacks to utilizing pardons related to the fact that the use of the pardon power is in decline for reasons that will be difficult to stem.²³¹ First, executives may be difficult to persuade to take public, personal heat for the decision to broadly pardon persons convicted of offenses, which is one of the reasons why executive use of the clemency power has declined over time.²³² While local District Attorneys' offices may be more opaque and insulated from publicity, gubernatorial decisions enjoy statewide and possibly national media coverage, and it is more difficult for a governor to evade personal responsibility for pardon exercise (and some political campaigns have had to contend with the after-effects of

²²⁹ See KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* 217 (1989).

²³⁰ See Kathleen Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST. 26, 27 (2009) (noting that while the Illinois and California governors possess similarly broad pardon authority, the California governorship has chosen to constrain itself with process).

²³¹ See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT'G REP. 125, 125 (2001) (noting a decline in the use of presidential pardons and offering reasons that pardons have become disfavored).

²³² One scholar who has studied the decline in use of pardon power notes that “[s]ome governors think, ‘why should I do this? It won’t benefit me politically and it might hurt me.’ There’s some very crass political calculating going on.” Maggie Clark, *Governors’ Pardons Are Becoming a Rarity*, PEW FOUND.: STATELINE (Feb. 8, 2013), <http://www.governing.com/news/state/sl-governors-balance-politics-with-pardons.html> [<https://perma.cc/86SP-KU4H>]. Fear of political backlash is likely why some governors have chosen to issue controversial clemency grants as they have been on the way out of office. See *supra* note 226 and accompanying text (discussing the decisions of several governors to commute the death rows in their states during their lame duck governing periods). Some governors have, however, recently been willing to exercise clemency discretion; Governor Jerry Brown, for example, pardoned more than 1,000 people from 2011 to 2018, as compared to his immediate predecessors Gray Davis, who granted no pardons at all, and Arnold Schwarzenegger, who granted fifteen pardons. See Kate Mather, *Gov. Jerry Brown Grants 132 Pre-Christmas Pardons, Commutes 19 Sentences*, L.A. TIMES, Dec. 23, 2017, <https://www.latimes.com/politics/la-pol-ca-jerry-brown-christmas-pardons-20171223-story.html> [<https://perma.cc/HLB6-MGJ9>].

controversial clemency decisions).²³³ Second, the relatively unchecked discretion governors enjoy to offer clemency may delegitimize its offer; while a pardon will have the same legal effect whether voters accept its appropriateness or not, the unilateral offer of pardons without legislative process may, in the long term, make people less likely to favor broad conviction clearance and less likely to respect the issuance of any particular pardon. Finally, pardons require persons with convictions to navigate an infrastructure in order to enjoy the effects of a pardon, which would likely reduce the reach of any systematic pardons. Potential applicants would have to be aware that the pardon process was available; take the initiative to navigate the process; and then successfully complete that navigation.²³⁴ Records and paperwork that a person ordinarily might be expected to produce in order to seek a pardon may no longer be available,²³⁵ and there may be financial costs associated with obtaining those records. Some people would not have the awareness, fortitude, or finances to complete the process. The pardon process can be streamlined—Governor Inslee’s pardon process, for example, has an online form that people can access that is specifically designed to permit individuals to apply for pardons without, for example, employing a lawyer as a process guide. The process requires applicants to fill out the online form (applicants do need to find their case numbers) rather

²³³ George H.W. Bush, under the media guidance of Lee Atwater, famously ran a political advertisement focusing on then-governor Michael Dukakis’ decision to furlough Willie Horton, and the common wisdom has been that the combination of “soft on crime” allegations and racial focus helped cost Dukakis the 1988 Presidential election. See, e.g., Morgan Whitaker, *The Legacy of the Willie Horton Ad Lives on, 25 Years Later*, MSNBC (Oct. 21, 2013), <http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives> [<https://perma.cc/RM83-ZTHZ>]. The actual effects of the ad may have been overblown. John Sides, *It’s Time to Stop the Endless Hype of the ‘Willie Horton’ Ad*, WASH. POST, Jan. 6, 2016, <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/06/its-time-to-stop-the-endless-hype-of-the-willie-horton-ad/> [<https://perma.cc/8XS2-FEK4>] (arguing that few viewers saw the Willie Horton ad and that by the time of the election, any effects had been largely neutralized). Nevertheless, the Willie Horton ad has cast a long shadow over clemency decisions.

²³⁴ The pardon instructions for Vietnam War Era offenses comprise about a page and a quarter of single-spaced text and require individuals who want to seek such a pardon to first determine if the particular offense for conviction qualifies; to fill out a form “fully and carefully” and submit it to the Department of Justice (“DOJ”); and to provide to DOJ the charging document for the offense and the judgment of conviction or a court docket sheet showing the date of sentence and sentence imposed. *Vietnam War Era Pardon Instructions*, U.S. DEP’T OF JUST., OFF. OF THE PARDON ATT’Y, <https://www.justice.gov/pardon/vietnam-war-era-pardon-instructions> [<https://perma.cc/F5KM-82UZ>].

²³⁵ The Vietnam War Era Pardon Instructions offer a link to the national archives so that a person who seeks a pardon can “research whether documents from your prosecution are still available.” *Id.* While many persons who would want to seek a pardon for marijuana offenses will have recent convictions, certainly many others will have convictions that are decades old, and may have difficulty obtaining supporting documentation should any be required.

than obtain copies of convictions personally.²³⁶ Still, even a streamlined pardon process requires initiative and some level of knowledge, sophistication, and resources.²³⁷

Ordinarily, administrative hurdles might not be prohibitive concerns, because a person's commitment to the pardon process can serve as an appropriate proxy for their rehabilitation, which is a reasonable requirement for applicants who have committed offenses that we still consider socially dangerous.²³⁸ We may believe people to be more worthy of pardon when they are willing to demonstrate remorse and reformation by submitting themselves to the process and putting in the associated work. But here, when the purpose of the pardon is to reduce the collateral effects of convictions reflecting behavior that no longer is criminal, the pardon process sorting mechanism is more difficult to justify. Providing access to pardons clearly is superior to no pardon at all, but since many of the people who are eligible for pardons might be among the least able to navigate a pardon process, having an expungement process that is prosecutor-initiated rather than civilian-initiated most likely would be preferable.²³⁹

A final reason why pardons might not be the most appropriate mechanism for eliminating the effects of past criminal convictions is more theoretical than practical: a pardon may communicate that a person engaged in socially harmful behavior, but has in the interim demonstrated herself to be sufficiently worthy and reformed to merit relief from the criminal conviction. Thus conceptualized, pardons are executive grants often based on mercy.²⁴⁰ Mercy is not the right fit for conceptualizing the erasure of past convictions when the decision to punish the individual was unjust in the first

²³⁶ The forms for the process are available at <https://www.governor.wa.gov/sites/default/files/2018-Clemency-and-Pardons-Instructions.pdf> [<https://perma.cc/8DK8-DPLQ>].

²³⁷ The success of expungement reforms in Indiana, for example, is partially attributable to the involvement of lawyers for applicants. See John Gaines & Margaret Love, *Expungement in Indiana*, 30 FED. SENT'G REP. 252, 252 (2018).

²³⁸ When society wants to accord forgiveness for acts still considered socially harmful or wants to recognize efforts at reformation from those who have committed such acts, placing the onus on them and seeing how they respond might serve as an imperfect proxy for whether they are worthy of forgiveness or have indeed reformed.

²³⁹ For example, the pardon process that Governor Inslee announced in January of 2019 was not necessarily initiated because Washington considered the pardon process to be superior to the expungement process, but because of the failure of expungement statutes to make headway in the legislature. See e.g., Jim Brunner, *Inslee Pardons Pot Convictions of 13 Washington Residents. Now Lawmakers May Clear Criminal Records for 200,000 More*, SEATTLE TIMES, Feb. 10, 2019, <https://www.seattletimes.com/seattle-news/politics/inslee-pardons-13-marijuana-convictions-in-a-month-as-lawmakers-consider-expunging-hundreds-of-thousands-more/> [<https://perma.cc/GHD8-K3M9>].

²⁴⁰ See MOORE, *supra* note 229, at 5.

place and when the point of removing the conviction is to offer limited redress for a harm inflicted by the state. This message is also inappropriate because it places the onus on the convicted individual to demonstrate worthiness and reform, even though the state harmed the individual and needs to make amends. Such focus may help explain why, for example, the proposed pardon process in Washington is limited—an individual is eligible to be relieved of the burden of a criminal conviction, but only if they had never before committed a criminal offense and have not committed another offense in the intervening years.²⁴¹ Pardons are, of course, often issued not because the person rehabilitated, but because the executive determines that justice was miscarried, the person was innocent in the first place, or the punishment was motivated by bias or other forces that should not be relevant to criminal sentencing.²⁴² Nevertheless, the use of the pardon power can suggest forgiveness and mercy on the part of the state.

The War on Drugs—and its use of marijuana as a battlefield—affirmatively harmed (and continues to harm) individuals and communities. Relief from the burden of conviction should be granted, not because the individual has somehow personally earned it, but because the conviction never should have existed in the first place, as we now understand.

²⁴¹ See Johnson, *supra* note 2.

²⁴² A recent high-profile pardon involved the Groveland Four. See, e.g., Katie Mettler, 'Miscarriage of Justice': Florida Finally Pardons Four Black Men Accused of Rape in 1949, WASH. POST, Jan. 11, 2019, https://www.washingtonpost.com/history/2019/01/11/years-after-miscarriage-justice-florida-pardons-four-black-men-accused-rape-by-white-woman/?utm_term=.62f586ee1488 [<https://perma.cc/Q3BL-KYWN>] (Florida formally apologized and issued posthumous pardons for four black men wrongly accused of raping a white woman; two had been killed by a mob that included a local sheriff, while the others were convicted at trial). In the federal criminal justice system, the Justice Department's Standards for Consideration of Clemency petitioners identifies innocence or miscarriage of justice as grounds for a pardon application, but also counsels that an applicant will "bear a formidable burden of persuasion." See *Standards for Consideration of Clemency Petitions*, U.S. DEP'T OF JUST., OFF. OF THE PARDON ATT'Y, <https://www.justice.gov/pardon/about-office-0> [<https://perma.cc/T696-NSXB>] (last accessed Mar. 11, 2020). Some state jurisdictions have specific standards for persons claiming innocence rather than requesting mercy. Texas requires a person who petitions for a pardon based on factual innocence to provide evidence of actual innocence from at least two trial officials or findings of fact and conclusions of law from the district judge that demonstrate actual innocence. See *What is a Pardon for Innocence?*, TX. BD. OF PARDONS & PAROLES (Jan. 2, 2019), http://www.tdcj.state.tx.us/bpp/exec_clem/Pardon_for_Innocence.html [<https://perma.cc/F4AX-XWLV>] (distinguishing a pardon for innocence from other pardons).

B. EXPUNGEMENTS (AND RECORD SEALING)

A second method to relieve the burden of a past conviction is through expungement and record sealing.²⁴³ Expungement is a traditional method for removing past convictions from a person's record (and may also be used to eliminate arrest records).²⁴⁴ Many jurisdictions have long permitted expungements for old offenses by statute or constitutional provision under particular circumstances, usually where the offense is minor and the applicant has no other convictions.²⁴⁵ Expungement access also has been an aspect of criminal justice reform.²⁴⁶ Judges generally grant expungements upon the request of a convicted person,²⁴⁷ although prosecutors also have a role in the expungement process and can elect to seek an expungement without a convicted person's request.²⁴⁸

California's expungement process for marijuana convictions requires the state's Department of Justice ("DOJ") to review existing state conviction databases and identify convictions that can be expunged or reclassified (from felony to misdemeanor).²⁴⁹ This occurs through a semi-automatic process: the state DOJ identifies eligible convictions and notifies prosecutors; public defenders also receive notification and are to communicate with convicted persons to the extent practicable; and prosecutors have an opportunity to contest expungement if they consider a person to be too much of an ongoing danger to receive expungement.²⁵⁰ In the absence of any objection, expungement proceeds automatically.²⁵¹

Expungements carry some advantages over pardons. First, the expungement process can be initiated by a wider variety of actors. If a

²⁴³ Some jurisdictions also provide mechanisms to protect records from particular uses, but in a manner more limited than expungement. *See, e.g.*, 18 PA. STAT AND CONS. STAT. ANN. § 9121(b)(2) (West 2018).

²⁴⁴ For an excellent general discussion of the history and purpose of expungement, see Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2839–41 (2017).

²⁴⁵ *Id.* at 2824.

²⁴⁶ Texas adopted a "second chances" law that allowed persons convicted of non-DWI first-time offenses to expunge a broader variety of those offenses. Mike Ward, 'Second Chance' Bill Gets Final OK in Texas Senate, HOUS. CHRON., May 22, 2017, <https://www.chron.com/news/politics/texas/article/Second-chance-bill-gets-final-OK-in-Texas-Senate-11164479.php> [<https://perma.cc/FL4G-SNED>].

²⁴⁷ *See* Murray, *supra* note 244, at 2825; *see also* Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1150 n.56 (2015).

²⁴⁸ *See* Murray, *supra* note 244, at 2832.

²⁴⁹ *See* CAL. HEALTH & SAFETY § 11361.9 (2018) (effective Jan. 1, 2019).

²⁵⁰ *Id.*

²⁵¹ *Id.*

particular state's government is hostile to broad clearance of marijuana convictions, local offices of prosecution can at least take the initiative to begin the process for city offenses, as prosecutors did in San Francisco, Seattle, and San Diego.²⁵² Second, the expungement process seems more open to initiation by the government, without requiring the individual to know that there is a process for removing a conviction and navigate that process successfully. Third, voters can demand an expungement process through ballot initiative. Ballot initiatives bypass the political concerns of executives considering use of the pardon power, the similar reelection concerns of individual state legislators, and the legislative rules and processes that might make adopting even a popular piece of legislation difficult.²⁵³ Finally, expungements often are more automatic and non-discretionary—a jurisdiction may permit all people with convictions a certain number of years old to expunge those convictions, and the process often is automatic if a person meets the requirements. As a practical matter, this Article argues that a jurisdiction should follow whatever process most expediently removes prior convictions in the political atmosphere in that state, but as a theoretical matter, a state-initiated and automatic process seems a better fit where the issue is not that we think a person has sufficiently reformed, but that the behavior did not merit conviction in the first place.

Expungements do, however, have drawbacks. First, expungement processes, like pardon processes, may rely on the initiative of individuals to seek expungement, even if such expungements are authorized by state law under specified criteria.²⁵⁴ The person may be required to navigate a process that could include filing a motion in court. Many people in jurisdictions where such a process is available simply have not chosen to do so.²⁵⁵ Second,

²⁵² See Matt Hoffman, *San Diego City Attorney Moves to Dismiss 5,000-Plus Marijuana Convictions*, KPBS (Sept. 25, 2019), <https://www.kpbs.org/news/2019/sep/25/city-attorney-moving-dismiss-more-5000-convictions/> [<https://perma.cc/669A-3XLB>]; Evan Sernoffsky, *SF District Attorney to Wipe Out 9,000-plus Pot Cases Going Back to 1975*, S.F. CHRON., Feb. 25, 2019, <https://www.sfchronicle.com/crime/article/SF-district-attorney-wipes-out-9-000-plus-13643128.php> [<https://perma.cc/7LSM-L3XP>]; Press Release, City of Seattle to Nullify All Misdemeanor Marijuana Convictions from Years Prior to Legalization (Feb. 8, 2018), <http://www.drugpolicy.org/press-release/2018/02/city-seattle-nullify-all-misdemeanor-marijuana-possession-convictions-years> [<https://perma.cc/DZH7-QD84>].

²⁵³ For similar recent uses of the initiative process to counteract the perverse political incentives that often slow criminal justice reform, see *supra* Part III.A.

²⁵⁴ The expungement process in Oregon, for example, requires the convicted person to take such initiative. See OR. REV. STAT. § 137.225 (2015).

²⁵⁵ According to the Drug Policy Alliance, while about half a million people were arrested for marijuana offenses in California, during the period of time when individuals needed to apply for expungements, only about 1,506 sent in applications. In Oregon, perhaps 78,000

if the advantage of expungements is that they may rely on the initiative of state actors to find and clear convictions, that process of finding and clearing is not costless. Part of the reason that government-initiated clearance programs may be limited is that they require the time and dedication of government personnel (sometimes, the same personnel that generally prosecutes people for offenses) to identify convictions and comply with expungement processes.²⁵⁶ If individuals seeking expungements shoulder the entire burden, arguably only people who would meaningfully benefit from expungements will explore the process (for example, a person with a number of more serious, ineligible convictions will be less motivated to seek expungement and less likely to benefit from such a grant), and the cost to the state will be concomitantly less. Third, some jurisdictions have procedural barriers to expungement in situations where a person has multiple convictions from the same incident and not all of those convictions are eligible for expungement; so, in such a jurisdiction, without other legal changes, expungements of marijuana offenses for some individuals may be impossible.²⁵⁷ Finally, to any extent that an expungement is discretionary (and this Article argues that expungements should be routine, automatic, and non-discretionary), people who have lengthy criminal histories (even if those histories involve only marijuana offenses) or complicated criminal histories (that include non-marijuana offenses) may have difficulty getting relief.²⁵⁸

A final point applying to both pardons and expungements: jurisdictions will likely need to seal records of marijuana-related convictions and arrests (which may be a part of the expungement process, or might require a separate initiative— in which case, as the state initiates expungement, it should also initiate record-sealing) to the extent that potential employers, landlords, and other public interested parties might be able to access court records.²⁵⁹

convictions are eligible for expungement, but only about 1,206 applied from 2015 to 2017. *See* Quinton, *supra* note 133.

²⁵⁶ Some local nonprofits have attempted to ease this burden through projects that assist people in navigating the expungement process. *See, e.g.*, Volunteer Legal Services, *Records Project*, KING CTY. BAR ASS'N, <https://www.kcba.org/Portals/0/for-public/RecordsProjectFlyer.pdf> [<https://perma.cc/WWN8-JYSD>].

²⁵⁷ Maryland, for example, has the “Unit Rule,” which requires that if a person wishes to seek expungement of charges related to a particular transaction, all of those charges must be eligible for expungement for expungement on any charge to be granted. *See* EXPUNGEMENT: UNIT RULE, MD. ALLIANCE FOR JUST. REFORM, <https://www.ma4jr.org/expungement-unit-rule/> [<https://perma.cc/B2EC-H9ZV>].

²⁵⁸ Courts more commonly reject applications from persons with extensive criminal histories. *See* Quinton, *supra* note 133.

²⁵⁹ *See, e.g.*, Sharon M. Dietrich, *Clean Slate Brings Automated and Expanded Criminal Record Sealing to Pennsylvania*, 90 PA. B. ASS'N Q. 39, 42 (2019) (explaining historical difference between expungement and sealing processes).

Jurisdictions also will likely further need to restrict employers, landlords, and similarly-situated parties from asking about convictions and arrests.²⁶⁰

V. RESPONDING TO POSSIBLE CONCERNS

There are a number of possible arguments against this Article's proposal that should be addressed. These arguments center primarily around the importance of maintaining accurate public records of past criminal behavior, and the belief that past criminal behavior is at least somewhat predictive of future behavior even if it represents transgression against norms no longer encoded in criminal law. This Article does not argue that expunging or pardoning past convictions carries no possible downsides—the categories of people who receive relief may be both over and under-inclusive, and there may be some important social interests that are less well-served when people no longer carry these convictions. There are also theoretical reasons why we might wish to continue to mark persons who elected to violate the criminal code even if we consider the behavior in which they engaged to no longer be—if it ever was—problematic. In this section, this Article responds to the most salient objections to across-the-board pardons, expungements, and conviction sealing for marijuana-related offenses. While this Article concludes that the benefits of clearing convictions exceed the costs, the costs are worth recognizing and addressing.

One critique is that by sealing marijuana convictions, people who actually committed non-marijuana offenses—perhaps violent offenses or other offenses that appropriately garner broad social opprobrium—will receive an undeserved windfall where premised on the assumption that a marijuana offense (or a series of marijuana offenses) was their only crime for which they were convicted. Criminal convictions do not necessarily reflect all underlying criminal conduct.²⁶¹ Since the overwhelming majority of convictions rest on guilty pleas rather than on verdicts reached at trial,²⁶² and

²⁶⁰ See *supra* note 190 and works cited therein (discussing “ban the box” statutes).

²⁶¹ When Colorado first introduced legislation to expunge past convictions, some prosecutors successfully opposed the legislation on exactly this basis. A spokesman for the Colorado District Attorneys’ Council, for example, argued that “There were many cases of distribution that were pleaded to low-level [possession] felonies.” Quinton, *supra* note 133. For an explanation of how plea bargaining works (including dismissing charges), see generally Bibas, *supra* note 207.

²⁶² At least 90%—and in some jurisdictions, a much higher percentage—of cases that result in convictions are resolved by plea bargaining. See BRIAN A. REAVES, U.S. DEP’T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, Stat. Tbl. 22, 25 (2013); see also NAT’L ASS’N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), <https://www.nacdl.org/>

since the plea bargaining process (whereby parties may negotiate the dismissal of charges) prompts many of those pleas, it certainly will be the case that an individual who has pleaded guilty to a marijuana offense may have enjoyed the dismissal of non-marijuana offenses connected to the same underlying facts.²⁶³ For example, a person might have originally faced charges of felony possession with intent to distribute marijuana and carrying a weapon in connection with a drug offense, and a prosecutor might have agreed to dismiss the weapons charge in exchange for a guilty plea to the marijuana offense. Charges from entirely separate incidents also may have been dismissed as part of a plea package.²⁶⁴ A person might have a marijuana distribution offense that was reduced to a simple possession offense, which would matter should a jurisdiction limit conviction clearance to minor offenses.

The argument here is that a person who had committed a number of offenses but pleaded guilty only to marijuana offenses would be unfairly advantaged, and prosecutors would not have willingly entered those plea bargains had they understood that, eventually, the person would no longer have consequences even for the marijuana conviction itself. Prosecutors might say that had they known that the marijuana convictions eventually would be dismissed, they would have sought conviction for the other offenses, because the person's behavior in total merited some form of criminal correction. The state perhaps has an interest, also, in marking an individual as having committed some sort of criminal offense and in signaling the degree and extent of a criminal history to future prosecutors, police, and other community actors, and a person with only marijuana offenses will no longer be easily and publicly designated as a person who has committed criminal offenses. To the extent that they have criminal histories that no longer reflect a conviction for a particular set of charges but do have other non-expunged charges, their records will look light.

There are several reasons, however, why this argument ultimately is unpersuasive. First, prosecutors often—perhaps, generally—dismiss the charges that they are least likely to be able to prove at trial or are least important to prove.²⁶⁵ Prosecutors often overcharge in order to facilitate plea bargaining, and may press charges where they have scant chance of

trialpenaltyreport/ [https://perma.cc/4SEU-VUSY] (concluding that less than 3% of federal cases go to trial).

²⁶³ See generally Bibas, *supra* note 207.

²⁶⁴ See *id.*

²⁶⁵ Cf. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 (2002) (discussing quality of evidence and what prosecutors can prove as essential aspects of screening charges).

sustaining a beyond-a-reasonable-doubt burden at trial in order to pressure criminal defendants into pleading guilty to some narrower offense.²⁶⁶ The gulf between the possible penalties available at trial—often 25% higher for the same charges—and the sentences authorized by plea bargains further promotes pleas.²⁶⁷ The dismissal of related charges in exchange for a plea of guilty, in other words, may not bear much relationship to actual culpability for those charges; those charges may have been filed for strategic reasons, and may have been dismissed for lack of evidence sufficient to meet the state's burden of proof beyond a reasonable doubt, regardless of whether or not plea bargaining occurred.²⁶⁸ Second, drug offenses, unlike violent offenses or property offenses, generally will not have specific victims who, in many jurisdictions, now have statutory rights to be involved in plea bargaining; if the related charges were particularly important and involved actual victims, those charges likely would have been the focus for conviction.²⁶⁹ Further, while the publicly-accessed criminal record will no longer reflect an expunged and sealed offense, prosecutors and courts generally can still access expunged and pardoned convictions, which might be taken into account in charging and sentencing should a person re-offend.²⁷⁰ Finally, and most importantly, a person who was convicted of a marijuana offense in the past has, by definition, already experienced the criminal punishment process. The convicting court imposed some

²⁶⁶ See *id.* at 33. It is difficult to catalog how widespread overcharging is because plea bargaining generally occurs outside of court, and prosecutors do not self-report overcharging. See Bibas, *supra* note 207, at 2547.

²⁶⁷ See, e.g., H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 64 (2011) (arguing that overcharging may persuade risk-averse innocent persons to plead guilty); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1371 (2000) (describing how federal sentencing guidelines create higher sentences for persons convicted at trial versus pleading guilty to same offenses).

²⁶⁸ See, e.g., Wright & Miller, *supra* note 265.

²⁶⁹ Both federal and state law frequently provide crime victims with a statutory right to “confer” with the prosecutor before the government drops charges, agrees to plea arrangements, or recommends sentences. See, e.g., 18 U.S.C. § 3771(a)(5) (2015) (providing victims with “the reasonable right to confer with the attorney for the Government in the case”); AK. CONST. art. I, § 24 (granting victims “the right to confer with the prosecution”); ARIZ. CONST. art. 2 § 2.1(A)(6) (granting victims the right to “confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition”); OR. CONST. art. I § 42(1)(f) (granting victims the “right to be consulted, upon request, regarding plea negotiations involving any violent felony”).

²⁷⁰ This Article does not advocate that prosecutors reflect expunged convictions in prosecution decisions but acknowledges that under most pardon and expungement systems they retain some discretion to (silently) do so if they so choose.

punishment—whether incarceration, probation, or fine—and that punishment presumably reflected what was thought to be the person’s collected retributive responsibility as well as the utilitarian need for deterrence, incapacitation, and rehabilitation. The criminal conviction itself is not supposed to be the punishment, and the argument to maintain a public record of conviction for legitimate criminal law purposes is thin.

A related argument some have offered for being cautious about expunging marijuana convictions is that we believe that prosecutors and sentencing courts ought to have access to those convictions when determining appropriate charges for future criminal activity and reasonable sentences for that activity. This argument is superficially a little more persuasive, as past criminal activity has historically been a primary factor that criminal justice has used in determining appropriate present punishment.²⁷¹ While states that have legalized marijuana use have determined that recreational marijuana is a legitimate business and acceptable leisure pursuit, and while a person adhering to the current legal regime thus chooses to conform his or her behavior to the dictates of law, a person who in the past used, cultivated, or sold marijuana made an affirmative decision to transgress criminal law. That decision to transgress criminal law is itself morally blameworthy, regardless of whether or not social attitudes have shifted to the point that marijuana now enjoys legal status.

This argument is unpersuasive for a few reasons. First, prosecutors and judges may in many jurisdictions use expunged convictions in charging and sentencing;²⁷² while this Article is not advocating for such use, jurisdictions can make past pardoned and expunged convictions available to criminal justice actors to guide discretion. Second, this argument elides the extent to which marijuana use and sales have been widespread for decades, but the costs of criminal behavior have been borne by an unrepresentative few. As this Article has demonstrated, persons convicted for marijuana offenses are predominantly poor and from minority communities.²⁷³ Further, those persons convicted of marijuana offenses have actually experienced punishment, unlike the overwhelming majority of people who have used or sold marijuana who experienced no such consequences. In other words, if past marijuana-related criminal activity is central to charging or sentencing culpability, prosecutors and judges largely will not have access to

²⁷¹ For a thorough discussion of the history and policy behind this practice, see Nancy J. King, *Barrock Lecture: Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 MARQ. L. REV. 523 (2014).

²⁷² See Western et al., *supra* note 220 and accompanying text.

²⁷³ See *supra* notes 190, 260–265 and accompanying text.

documentation of the majority of such activity; the marginal value of being able to use past convictions for people who largely have those convictions because of poverty or race seems less weighty when we are dealing with conduct that is now legalized.

With respect to that law-abiding citizenship, however, a third and related argument against expunging marijuana convictions is that those convicted persons elected to violate criminal law. This argument has both a general and a marijuana-specific form. As a general matter, the decision to knowingly transgress existing statutory rules arguably says something about an individual's character or future dangerousness.²⁷⁴ According to this argument, erasing the conviction undermines the rule of law. More specifically, while states now permit a legal marijuana trade and personal marijuana use is not criminally prosecuted under most circumstances, all states still retain some criminal regulation of marijuana, forbidding, for example, unlicensed cultivation or sales outside of the legally regulated framework.²⁷⁵ Some might argue that persons convicted under the old laws are generally analogous to persons who smoke marijuana in prohibited locations or sell marijuana illicitly at present rather than those who use, buy, or sell it legally.

The difficulty with this argument tracks the difficulties with other objections. A person with a prior conviction has, in fact, been punished by whatever sentence he or she received at the time of conviction. Since the punishment itself cannot be withdrawn, the only real question is whether or not a person should continue to experience the collateral effects of prior conviction even after completing punishment. While the person indeed elected to engage in criminal activity, as this Article has noted, that decision does little to set him or her apart from the many other people who engaged in identical behavior but escaped detection or punishment, often in large part because of structural advantages.²⁷⁶ Further, at the time that the person engaged in the behavior, unlike at present, there was not a legal option for sales or possession; those formerly convicted are not in the same position as a person who makes the decision not to adhere to a legal regime in favor of an illicit one. Finally, part of the point of erasing past convictions is for us,

²⁷⁴ The degree to which human psychological processes seek to conflate criminal culpability and bad character even in the presence of legal rules prohibiting such conflation or in contexts in which the link is empirically tenuous is the subject of a rich literature. *See, e.g.*, Janice Nadler & Mary-Hunter McDonell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255 (2012).

²⁷⁵ States do restrict marijuana use by age and location. For a list of such restrictions in Washington State, see *Know the Law*, WASH. STATE LIQUOR & CANNABIS BD., <https://lcb.wa.gov/mj-education/know-the-law> [<https://perma.cc/484W-WFCW>].

²⁷⁶ *See supra* notes 190, 260–265 and accompanying text.

collectively, to admit that we made an error in criminalizing, prosecuting, and punishing in the first place—we used animus towards disfavored groups and bad information to create laws that rationally should not have existed in the first place and permitted most people to violate those laws without consequence. We engaged in a War on Drugs that punished primarily the least powerful members of communities, and the best we can do now is to relieve the people we harmed from the burden of continuing to be marked as criminals based on marijuana-related activity.

Further, continuing to expose persons convicted of criminal offenses to the constraints of collateral consequences where the underlying activity has been legalized and where people receive economic benefit from the activity's current iterations may itself undermine the rule of law. Overcriminalization itself undermines public respect for criminal law.²⁷⁷ As communities gain awareness that members may carry convictions for behavior that no longer is criminalized (and that many of us regret criminalizing in the first place), the communicative force of the criminal law may be weakened—how can we trust a social demarcation of criminal status where a person could engage in the same behavior today and not just escape punishment, but build capital? A number of opinion pieces and news articles in popular media sources, as well as prominent public and political figures, have noted the dichotomy between the poor, minority persons who continue to be imprisoned for or constrained by marijuana convictions and the affluent, mostly white citizens who are profiting from the cannabis industry.²⁷⁸

CONCLUSION

The project of reducing the impact of past convictions on current and future civil, employment, educational, and social opportunities is daunting and difficult. We have institutionalized the notion that persons with criminal convictions are “other” and lesser and have imposed formal and structural barriers to their full civic engagement. In the long term, it may be worthwhile to reconsider the extent to which criminal convictions, even for behavior that we continue to consider socially dangerous, should mark and constrain

²⁷⁷ See, e.g., DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 26–27 (2008).

²⁷⁸ See, e.g., Croucher, *supra* note 26; Erin Donnelly, *Critics Call Out Billy Ray Cyrus's Weed Photo: “Every Single Person in Jail Right Now for Smoking Pot Should Be Released”*, YAHOO! ENT (Feb. 18, 2019), <https://www.yahoo.com/entertainment/critics-call-billy-ray-cyruss-weed-photo-every-single-person-jail-right-now-smoking-pot-released-133124812.html> [<https://perma.cc/58SU-6YPY>]; Vincent M. Southerland & Johanna B. Steinberg, *Boehner Benefits from Weed. Blacks Are in Prison for Using It.*, N.Y. TIMES, Apr. 19, 2018, <https://www.nytimes.com/2018/04/19/opinion/boehner-marijuana-blacks-prison.html> [<https://perma.cc/Q9YZ-2WMB>].

persons once they have received their punishment. At the least, however, we should commit to removing those burdens where criminal law no longer regulates the underlying behavior, and the argument for removing convictions is particularly strong where, as in states that have legalized marijuana for recreational use, the government goes so far as to regulate, tax, and promote the newly-approved behavior and industry.

Criminal convictions communicate social condemnation;²⁷⁹ that mantle is unfair to drape around persons whose past behaviors now are acknowledged as ones that comport with current values. The very real legal and social consequences for the individuals who bear the mark of conviction should move us toward expunging or pardoning and sealing convictions where the underlying behavior has been legalized. As we begin the process of decriminalizing offenses and decarcerating individuals, deleting past convictions is an important step, both to remove the constraints faced by convicted persons, as well as to make amends for having subjected those persons to criminal prosecution in the first place. This process should include people who made isolated errors that do not reflect their character, but also people who have multiple convictions and felony convictions. As we grapple with the after-effects of over-incarceration and inappropriate criminalization of a wide variety of social problems, the process of reconciliation must be broad and apologetic. If we are serious about rethinking how we administer criminal justice and about redressing individual and community harms, retroactively legalizing marijuana is the place to start.

²⁷⁹ See, e.g., Logan, *supra* note 194, at 1104–05.